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ABSTRACT

In the case of Ritter v. Stanton, the attorneys for Ira Ritter and Kroger alleged that the amount of damages awarded by the jury were excessive and asked the Indiana Supreme Court to review the matter. This set of three lesson plans for secondary educators uses the Ritter v. Stanton case to examine the concept of the U.S. constitutional right to trial by jury. Lessons are entitled: (1) "Can I Have a Jury Trial?" (2) "What Does a Jury Do Anyway?"; and (3) "Oral Arguments On-Line." Each lesson presents background information; states learning objectives; provides learning activities; suggests materials for further study; and addresses related Indiana Social Studies Standards. The set also contains a related glossary; a case summary; the Appellant's Petition to Transfer; the Appellee's Brief in Opposition to Petition to Transfer; the Appellant's Reply to Appellee Brief Opposing Transfer; and the Order Denying Transfer. (BT)

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ED 470 346

Ira C. Ritter and The Kroger Co., v. Jerry and Ruth Stanton.

"Trial by Jury"

Lesson plans for secondary teachers on the constitutional protections of trial by jury

2001

SO 034 290

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COURTS in the Classroom

Curriculum Concepts and Other Information on Indiana's Courts for the K-12 Educator

Ira C. Ritter and The Kroger Co., v. Jerry and Ruth Stanton.

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Ira C. Ritter and The Kroger Co., v. Jerry and Ruth Stanton

Lesson 1: Can I have a jury trial?

A lesson plan for secondary teachers on the constitutional protections of trial by jury*

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Background:
This lesson is based on the case of *Ritter v. Stanton*, but it can also be used as a stand-alone lesson on the constitutional right to trial by jury. The case summary, the briefs of the appellants (Ritter and Kroger Co.) and the appellees (Jerry and Ruth Stanton), and the one-hour webcast of the November 14, 2001 oral argument before the Indiana Supreme Court for *Ritter v. Stanton* are all available on-line at http://www.in.gov/judiciary/education/cotm.html

A separate lesson, giving an overview of the structure of Indiana's court system, is also available to provide students with general information about how Indiana courts works from the Courts in the Classroom homepage at http://www.in.gov/judiciary/education/.

A glossary of legal terms used in this and other Courts in the Classroom lesson plans is attached and is available on-line as well at http://www.in/gov/judiciary/education/glossary.html

Learning Objectives:
At the end of this lesson students should be able to:

1. Understand the legal phrase "trial by jury" and how it differs from a bench trial;
2. Discuss the protections offered by the U.S. Constitution and the Indiana Constitution regarding the right to trial by jury and how those rights are similar or different;
3. Use classroom, library and/or internet resources to research press coverage of jury trials; and
4. Compare the constitutional protection of individual liberties, specifically trial by jury, found in the U.S. and Indiana Constitutions with similar provisions in documents from nations around the world.

This lesson plan was written by Elizabeth R. Osborn, Special Assistant to the Chief Justice for Court History and Public Education. If you have any questions about this lesson, or ORAL ARGUMENTS ONLINE, feel free to contact her at (317) 233-8682 or eosborn@courts.state.in.us.

Learning Activities

1. Conduct a brainstorming session with students about the concept of trial by jury. Ask them, for example, what they think it means. Ask them to think about what courts would be like without juries. Ask if any students' parents have served on a jury.

2. Despite the impression we receive from television, very few legal issues are resolved by juries, or even go to trial at all. Ask students to research the differences between a jury trial and a bench trial. A legal dictionary like the one at www.Findlaw.com might be a good place to start. You might also talk about how many legal situations are resolved before they ever get to the courtroom. Plea-bargaining is one example of non-trial remedies that you might discuss. Indiana's legal system recognizes many kinds of "alternative dispute resolution" methods including arbitration, mediation, mini-trials and private judges.

3. The guarantee of trial by jury is considered by many Americans to be one of their most fundamental rights. Ask students to examine the U.S. Constitution [http://lcweb2.loc.gov/const/const.html] for any mention of the right to a jury trial; you might direct them to focus on Article III and the Bill of Rights [http://lcweb2.loc.gov/const/bor.html]. Ask another group of students to similarly examine the Indiana Constitution [http://www.in.gov/legislative/ic/code/const.html] for information on the right to jury trials (encourage them to closely examine Article I). Ask the students to think about why additional protections concerning trials were added to the Constitution in the Bill or Rights. Ask them to compare the protections offered in the U.S. and Indiana Constitutions. Are they identical? Pay particular attention to the discussion of civil trials. In Indiana, the legal remedy in a civil case does not always result in a jury trial.

4. Using local newspapers, news magazines such as *Newsweek, Time*, or *U.S. News & World Report*, or the Internet ask students to read media coverage of jury trials. What kind of cases seem more likely to result in jury trials based on their research? What kind of information does the press tend to emphasize? How much coverage is given to the jury selection process? Choosing a high profile case such as the O.J. Simpson or Timothy McVeigh trials might make this easier.

For Further Study:

1. Invite a local judge, prosecutor or attorney to visit your classroom; the Indiana StateBar Association (www.inbar.org) and local bar associations http://www.inbar.org/content/localbar/localbar.asp] are great resources for locating attorneys who are interested in working with schools. Consider taking your students to visit the local courthouse to tour a courtroom; you might even have the opportunity to sit in on part of a trial.
2. To give your students a better appreciation of the U.S. legal system, ask them to compare our legal system with that of a foreign country (using constitutions or other national documents available on the Internet [http://www.findlaw.com/12international/] or in local libraries).

Related Indiana Social Studies Standards

U.S. Government.1.13: Examine fundamental documents in the American political tradition..., the United States Constitution,...the Indiana Constitutions of 1816 and 1851 to identify key ideas regarding the nature of limited government and the protection of individual rights.

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U.S. Government.3.15: Compare core documents associated with the protection of individual rights, including the Northwest Ordinance, the Bill of Rights, the Fourteenth Amendment to the United States Constitution, and Article I of the Indiana Constitution.

U.S. Government.3.7: Distinguish among the enumerated, implied, and denied powers in the United States Constitution and the Indiana Constitution.

U.S. Government.4.11: Use a variety of information sources, including electronic media, to gather information about the impact of American ides about democracy and individual rights in other areas of the world.

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Ira C. Ritter and The Kroger Co. v. Jerry and Ruth Stanton

Lesson 2: What does a jury do anyway?

A lesson plan for secondary teachers on the constitutional protections of trial by jury*

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A separate lesson, giving an overview of the structure of Indiana's court system, is available on the Courts in the Classroom homepage at http://www.in.gov/judiciary/education/.

A glossary of legal terms used in this and other Courts in the Classroom lesson plans is attached and is available on-line as well at http://www.in/gov/judiciary/education/glossary.html

Learning Objectives:
At the end of this lesson students should be able to understand:

5. How juries are chosen;
6. The responsibilities, and duties given to juries; and
7. The differing role of the jury in civil (such as *Ritter v. Stanton*) and criminal cases.

Learning Activities:

1. We take for granted the right to trial by a jury of our peers, but this is not, and never has been, a universal right. Ask students to think about why American colonists believed the right to a jury trial was worth fighting (and dying) to protect. The Framers of the Constitution and the Bill of Rights were similarly concerned with protecting what they perceived as a fundamental right. Many organizations have webpages that provide historical information about juries. The Arizona Supreme Court's The American Jury System [http://www.supreme.state.az.us/

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jury/american.htm] and the Alabama State Bar [http://www.alabar.org/ClientDoc/rights.pdf both have short histories of the jury in the United States. The British Broadcasting Company's (BBC's) website also offers some English history [http://www.bbc.co.uk/history/state/monarchs_leaders/henryII_law03.shtml]on this topic. The Constitutional Rights Foundation [http://www.crfc.org/americanjury/origins.html] offers extensive on-line material covering a variety of jury related subjects.

2. Conduct a brainstorming session with your students. Ask them to think about ways to select people for jury duty. While a "jury of peers" does not mean an exact mirror of the defendant's age, race, gender, education, occupation, etc., it does mean a group of people drawn from all segments of the community. How can this be accomplished? What groups might be under- or over-represented? The Indiana Supreme Court has produced a set of standardized rules to help counties with the jury selection process. These Indiana Jury Rules will go into effect on January 1, 2003 and can be found at http://www.in.gov/judiciary/research/amend02/jury.pdf.

3. Potential jurors are summoned to the courthouse by mail (sample summons is attached and can also be found at [http://www.in.gov/judiciary/education/lessons/2001/nov/summons.pdf]); once there they may be asked to fill out a questionnaire before the actual selection process begins (sample questionnaire is attached and can be found at [http://www.in.gov/judiciary/education/lessons/2001/nov/questionnaire.pdf]). Jurors may serve on either a grand jury (6 citizens who decide whether or not the state should file charges against someone based on the evidence presented) or a petit jury (a group of 6 citizens in a civil case and either 6 or 12 in a criminal case). Using the information students have gathered from the Indiana Jury Rules (attached and at http://www.in.gov/judiciary/research/amend02/jury.pdf), especially Rules 16-18, have them role-play the jury selection process (called "voir dire") for either the *Ritter v. Stanton* case or some other case they have heard about in the news. Assign students to act as lawyers for each side, a judge, and a court reporter in addition to the jury pool members.

4. *Ritter v. Stanton* is a civil case (information on the difference between a civil and criminal case is attached). As the students learned in Activity 3, there are several significant differences in how jurors are selected in civil and criminal cases. The job of the jury also differs in civil and criminal trials. It is the responsibility of the judge, in both types of cases, to make sure that proper procedures are followed to ensure a fair trial.

   In criminal matters the prosecution must prove "beyond a reasonable doubt" that the defendant committed the crime in question. In civil matters the burden of proof is slightly different. Generally speaking, the jury must determine whether the preponderance of evidence shows what the plaintiff alleges.

   After opening arguments, presentation of evidence and/or witnesses, closing arguments, and instructions by the judge, the matter is turned over to the jury for deliberation. Again the differences in civil and criminal cases are important. In civil cases the judge tells the jury the appropriate law and the jury determines the facts. In criminal cases, the Indiana Constitution gives juries considerable authority to determine the law as well as the facts (review Article 1 Section 19 at http://www.in.gov/legislative/ic/code/const/art1.html). Once the jury reaches a verdict, it has completed the bulk of its work. In civil trials the jury may determine the damages to be awarded—most often a dollar amount. In criminal cases the sentencing is

carried out by the judge. As appropriate, however, the jury may be asked to make a recommendation concerning a sentence of death.

- Ask students to think about the different burdens of proof for civil and criminal trials. Which is a higher standard?
- Why do you think the writers of the Indiana Constitution gave criminal juries the leeway to determine the law as well as the fact? Do you think this is a good idea? Why or why not?
- In a criminal trial the jury verdict must be unanimous; in a civil trial, the parties may agree to a majority verdict. Do you think requiring unanimity is a good idea? Why or why not?

For Further Study:

1. Have students compare available information on jury selection in Indiana with that of other states. Many jurisdictions have information about their process up on the Internet. These sites can be located using a simple web search with terms like "jury duty." In Indiana, Marion County has its own website for prospective jurors: http://www.indygov.org/courts/jurypool/index.htm. Interested teachers can contact the Marion County Jury Pool Supervisor by calling (317) 327-5888 for information about special class visits and programs surrounding jury duty.

2. In the case of *Ritter v. Stanton* the attorneys for Ira Ritter and Kroger allege that the amount of damages awarded by the jury were excessive and ask the court to review this matter. Ask your students to read the briefs submitted by each side. Why do the Ritter/Kroger attorneys feel the award is excessive? The *Dollar Inn, Inc. v. Slone* [http://www.state.in.us/judiciary/opinions/archive/060902.wig.html] and *Sears Roebuck & Co. v. Manuilov* [http://www.state.in.us/judiciary/opinions/archive/01230101.bed.html] cases are cited by both sets of attorneys on this topic. Ask students to read these opinions (they are both available on-line) and to discuss the discretion given to a jury in awarding damages.

3. Compare the authority the Indiana Constitution gives juries in criminal matters with that of other states. Do many other states allow juries to determine the law as well as the facts? Does the U.S. Constitution allow this in federal courts?

4. The Indiana State Bar Association [ttp://www.inbar.org/content/pdf/brochure2001.pdf] produces a *Juror's Handbook*. Information about this publication can be found at their website or by calling (317) 639-5465 or Toll Free (800) 266-2581; Fax (317) 266-2588.

Related Indiana Social Studies Standards

U.S. History 1.1: Explain major ideas about government and key rights, rooted in the colonial and founding periods, which are embedded in key documents.

U.S. Government.1.9: Explain how the rule of law, embodied in a constitution, limits government to protect the rights of individuals.

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U.S. Government.2.6: Define and provide examples of fundamental principles and values of American political and civic life, including liberty, the common good, justice, equality, tolerance, law and order, rights of individuals….

U.S. Government.5.7: Describe the ways that individuals can serve their communities and participate responsibly in civil society and the political process at local, state, and national levels of government.

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A CIVIL CASE OR A CRIMINAL CASE?

Our legal system recognizes two different kinds of law cases -- civil and criminal. A civil case is one in which a person who feels he or she has been wronged brings legal action in order to protect his or her interests and, if appropriate, to collect damages from the person who has wronged him or her. The case is started by the person whose rights have allegedly been violated. This person is known as the plaintiff. The person being sued is known as the defendant.

A criminal case, on the other hand, is one in which the local, State, or Federal Government begins the action in the name of its citizens. The plaintiff is the government acting on behalf of the people. The case is prosecuted and the plaintiff is represented in court by the State Attorney, Statewide Prosecution, or the U.S. Attorney. The accused, known as the defendant, is charged with a crime against society -- a violation of the laws regulating our conduct, such as murder, rape, conspiracy, or robbery. In addition, less serious conduct such as driving without a license or conducting door to door solicitation without a permit may also violate the criminal laws.

In a civil case, the person who feels he or she has been wronged decides whether or not to bring suit against the defendant. The person also decides how much money in damages to seek. The person cannot request that the defendant go to jail except in unusual cases where the defendant may have violated a court order.

In a criminal case, the prosecutor or a grand jury decides whether to initiate criminal proceedings, that is, to charge the defendant with violating a law.

In a civil case, it is up to the plaintiff, the person who has started the lawsuit, to prove his or her case with stronger evidence than the defendant has -- that is, by a preponderance of the evidence. In other words, the judge or jury must believe that the weight of the plaintiff's evidence is greater than the weight of the defendant's evidence, if the plaintiff is to win.

In a criminal case, because a person is presumed to be innocent until proven guilty, the prosecution must prove the case beyond a reasonable doubt. This does not mean beyond all possible doubt, but it does mean the court or jury must have an abiding conviction to a moral certainty of the truth of the charge. This is a much heavier burden of proof than there is in a civil case.

In a civil case, any person may be required to testify in court. Everyone has the right to hire and appear with his or her own attorney, but in a civil case an attorney is not automatically appointed to represent a person who cannot afford an attorney. However, in some circumstances, local legal aid organizations, as well as private attorneys, will agree to represent a person free of charge who cannot afford to hire a lawyer.

In a criminal case, the accused person cannot be made to testify, and has the right to a free attorney, an attorney appointed by the court, if the person doesn't have the money or property to hire one. The accused person in a criminal case has many other rights which defendants in a civil case do not have. A defendant in a civil case may also be the defendant in a criminal case for the same alleged act -- theft, for example.

If you are involved in either a civil or a criminal case, you should contact an attorney.

JUROR NUMBER [redacted]

GROUP NUMBER 5

You are ordered to appear as a prospective juror for the Marion Circuit and Superior Courts the week of 03/26/2001

PLEASE CALL **327-4929** FROM 03/25/2001 THRU 03/28/2001 AFTER 5:00 PM TO LEARN IF YOUR GROUP IS REQUIRED TO REPORT TO THE CITY-COUNTY BUILDING THE NEXT DAY AT 8:00 AM.

Failure to comply with a summons for jury service may subject you to penalties for criminal contempt.

Public Assembly Room
Center Tower, Second Floor
City-County Building
200 East Washington Street
Indianapolis, IN 46204

Please use the staircase or elevators in the Center Tower to reach the Public Assembly Room.

Ordered pursuant to statute.

04/15/99 Sarah M. Taylor, Clerk of the Marion Circuit Court

PLEASE BRING THIS SUMMONS WITH YOU WHEN YOU REPORT FOR JURY SERVICE.

Jury Service: You should anticipate at least one day of service during the week for which you have been summoned. The selection process is usually concluded by early afternoon. An average trial may last one to three days.

Compensation: Jurors receive mileage calculated by zip code and a per diem of $15.00 for reporting for jury service or $40.00 for serving as a juror, pursuant to statute.

Attire: Everyday business attire is suggested and appreciated. You should bring a sweater or jacket for air-conditioned areas.

Pagers, cellular phones and weapons, including guns, knives sharp objects of any kind, mace and pepper spray, are not permitted.

Meals: You are responsible for your meals unless the jury is sequestered or deliberating.

ADA: In accordance with the Americans with Disabilities Act of 1990, the Court Services Agency provides auxiliary aids to disabled individuals. Please call 327-4918 for reasonable accommodations.

Parking/Public Transportation: Pay parking lots and garages are available near the City-County Building. Public transportation may be provided by INDY GO 635-3344.

More Information: Visit the court website at **www.indygov.org/courts**

JUROR NUMBER [redacted]

GROUP NUMBER 5

Place Postage Here

MAIL ONLY IF YOU CHECKED A RED BOX.
IF YOU CHECKED A BOX, DO NOT REPORT
OTHERWISE, BRING THIS SUMMONS WHEN
YOU REPORT FOR JURY SERVICE.

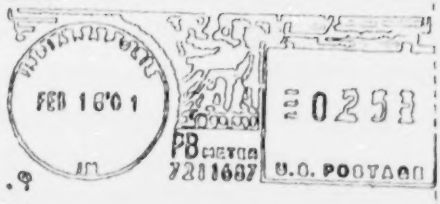
Jury Pool Coordinator
T321 City-County Building
200 East Washington Street
Indianapolis, IN 46204

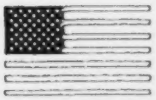
SEE REVERSE SIDE FOR OPENING INSTRUCTIONS

Sarah M. Taylor
Clerk of the Marion Circuit Court
200 East Washington Street
Indianapolis, IN 46204-3381

RETURN SERVICE REQUESTED

PRESORTED FIRST CLASS





IT'S AN HONOR TO SERVE AS A MARION COUNTY JUROR

SUMMONS FOR JURY SERVICE

[redacted]

46204-3307 08

Name _____

Address _____

Zip Code _____ Telephone _____

149678

Qualifications:

ARE YOU A CITIZEN OF THE UNITED STATES? YES ☐ NO ☐

ARE YOU 18 YEARS OF AGE OR OLDER? YES ☐ NO ☐

ARE YOU A RESIDENT OF MARION COUNTY? YES ☐ NO ☐

DO YOU READ, WRITE, SPEAK AND UNDERSTAND THE ENGLISH LANGUAGE? YES ☐ NO ☐

DO YOU HAVE A PHYSICAL OR MENTAL DISABILITY THAT WOULD INTERFERE WITH OR PREVENT JURY SERVICE? YES ☐ NO ☐

ARE YOU UNDER A SENTENCE IMPOSED FOR AN OFFENSE? YES ☐ NO ☐

ARE YOUR VOTING RIGHTS REVOKED? YES ☐ NO ☐

HAVE YOU SERVED AS A JUROR IN MARION COUNTY IN THE PAST YEAR? YES ☐ NO ☐
IF SO, LIST THE MONTH _____

ARE YOU UNDER A GUARDIANSHIP DUE TO A MENTAL INCAPACITY? YES ☐ NO ☐

☐ DUE TO PERSONAL HARDSHIP I AM UNAVAILABLE FOR JURY SERVICE AT THIS TIME, BUT, WOULD BE AVAILABLE WITHIN THE NEXT TWELVE (12) MONTHS

I WOULD BE AVAILABLE THE MONTH OF _____
THE JUDGE WILL ADDRESS ANY OTHER REASON YOU SHOULD BE EXCUSED IN COURT ON THE DAY YOU APPEAR FOR JURY SERVICE.

IF YOU ARE NOT A RESIDENT OF MARION COUNTY, DO YOU WANT TO CANCEL YOUR VOTER REGISTRATION? YES ☐ NO ☐

I AFFIRM UNDER PENALTIES FOR PERJURY THAT THE ANSWERS TO ALL QUESTIONS ARE TRUE AND CORRECT.

Date _____

Signature _____

MAIL ONLY IF YOU CHECKED A RED BOX.
IF YOU CHECKED A RED BOX, DO NOT REPORT.
OTHERWISE, BRING THIS SUMMONS WHEN YOU REPORT FOR JURY SERVICE.

13

REMOVE SIDE EDGES FIRST.
THEN FOLD, CREASE AND TEAR THIS STUB ALONG PERFORATION

②

JUROR QUESTIONNAIRE

Name_____ Juror Number_____

Zip Code_____ Age ☐18-30 ☐31-50 ☐51-65 ☐65+

Occupation_____ Employer_____

Marital Status: ☐Single ☐Married ☐Divorced ☐Widowed

List all other members of your household including children:

Name	Relationship	Age	Occupation

1. Have you ever served as a juror in a criminal trial?	☐Yes ☐No
2. Have you or anyone close to you ever been an eyewitness to a crime?	☐Yes ☐No
3. Have you or anyone close to you ever been the victim of a crime:	☐Yes ☐No
Date_____ Crime _____	
4. Have you or anyone close to you ever been charged with a crime:	☐Yes ☐No
Date_____ Crime _____	
5. Have you or anyone close to you ever been convicted of a crime?	☐Yes ☐No
Date_____ Crime _____	
6. Have you or anyone close to you ever worked as a law enforcement officer?	☐Yes ☐No
7. Have you or anyone close to you ever worked in any other law-related job?	☐Yes ☐No
8. Are you an employee of the Department of Correction?	☐Yes ☐No
9. Are you a spouse or child of an employee of the Department of Correction?	☐Yes ☐No
10. Can you be a fair and impartial juror in a criminal trial?	☐Yes ☐No
• • •	
11. Have you ever served as a juror in a civil trial?	☐Yes ☐No
12. Have you or anyone close to you ever been employed by or owned stock in any insurance company?	☐Yes ☐No
Name the insurance company: _____	
13. Have you or anyone close to you ever been injured in an accident?	☐Yes ☐No
14. Have you or anyone close to you ever been a party to a lawsuit?	☐Yes ☐No
15. Can you be a fair and impartial juror in a civil trial?	☐Yes ☐No
16. Do you have a problem that would prevent you from serving as a juror?	☐Yes ☐No
Explain the problem: _____	

I affirm under penalties for perjury that the answers to all questions are true and correct.

Date_____ **Signature**_____

THIS DOCUMENT IS A SAMPLE OF THE QUESTIONNAIRE PROVIDED TO POTENTIAL JURY MEMBERS AND IS NOT INTENDED FOR DOWNLOAD FOR THE PURPOSE OF OFFICIAL USE

IN THE

SUPREME COURT OF INDIANA

ORDER ADOPTING INDIANA JURY RULES

Under the authority vested in this Court to provide by rule for the procedure employed in all courts of this state and this Court's inherent authority to supervise the administration of all courts of this state, ***Indiana Jury Rules*** are adopted to read as follows:

INDIANA JURY RULES

RULE 1 SCOPE

These rules shall govern jury assembly, selection, and management in all courts of the State of Indiana.

RULE 2 JURY POOL

The judges of the trial courts shall administer the jury assembly process. The judges may appoint clerical personnel to aid in the administration of the jury system. Any person appointed to administer the jury assembly process is a jury administrator. The jury administrator shall compile the jury pool annually by selecting names from all the voter registration lists for the county, supplemented with names from other lists of persons resident in the county, including lists of utility customers, property taxpayers, persons filing income tax returns, motor vehicle registrations, city directories, telephone directories, and driver's licenses. Supplemental lists may not be substituted for the voter registration list. In drawing names from supplemental lists, the jury commissioner shall avoid duplication of names.

RULE 3 RANDOM DRAW

The jury administrator shall randomly draw names from the jury pool as needed to establish jury panels for jury selection. Prospective jurors shall not be drawn from bystanders or any source except the jury pool.

RULE 4 SUMMONS FOR JURY SERVICE

Not later than seven days after the date of the drawing of names from the master list, the jury administrator shall mail to each person whose name is drawn a juror qualification form, and

notice of the period during which any service may be performed. A judge may order prospective jurors to appear upon less notice when, in the course of jury selection, it becomes apparent that additional prospective jurors are required in order to complete jury selection. The jury administrator shall summon prospective jurors at least two (2) weeks before service. The summons shall include the following information: directions to court, parking, public transportation, compensation, attire, meals, and how to obtain auxiliary aids and services required by the Americans with Disabilities Act. The judge may direct the jury administrator to include a questionnaire to be completed by each prospective juror.

RULE 5 DISQUALIFICATION

The court shall determine if the prospective jurors are qualified to serve, or, if disabled but otherwise qualified, could serve with reasonable accommodation. In order to serve as a juror, a person shall state under oath or affirmation that he or she is:

(a) a citizen of the United States;
(b) at least eighteen (18) years of age;
(c) a resident of the summoning county;
(d) able to read, speak, and understand, the English language;
(e) not suffering from a physical or mental disability that prevents him or her from rendering satisfactory jury service;
(f) not under a guardianship appointment because of mental incapacity;
(g) not a person who has had rights to vote revoked by reason of a felony conviction and whose rights to vote have not been restored; and
(h) not a law enforcement officer, if the trial is for a criminal case.

Persons who are not eligible for jury service shall not serve.

RULE 6 EXEMPTION

A person who has completed a term of jury service in the year preceding the date of the person's summons may claim exemption from jury service. Only those exemptions expressly provided by statute are permitted.

RULE 7 DEFERRAL

The judge may approve a deferral of jury service for up to one (1) year upon a showing of undue hardship, extreme inconvenience, or public necessity.

RULE 8 DOCUMENTATION

The facts supporting juror disqualifications, exemptions, and deferrals shall be recorded under oath or affirmation. No disqualification, exemption, or deferral shall be granted unless the facts support it. These records shall be kept for a minimum of two (2) years.

RULE 9 TERM OF JURY SERVICE

(a) A person who appears for service as a petit or grand juror serves until the conclusion of the first trial in which the juror is sworn, regardless of the length of the trial or the manner in which the trial is disposed. A person who appears for service but is not selected and sworn as a juror completes the person's service at the end of one (1) day.

(b) A person who:

(1) serves as a juror under this chapter; or
(2) completes one (1) day of jury selection but is not chosen to serve as a juror;

may not be selected for another jury panel until all nonexempt persons in the jury pool for that year have been called for jury duty.

RULE 10 JUROR SAFETY AND PRIVACY

Personal information relating to a juror or prospective juror not disclosed in open court is confidential, other than for the use of the parties and counsel. The court shall maintain that confidentiality to an extent consistent with the constitutional and statutory rights of the parties.

RULE 11 JURY ORIENTATION

Trial courts shall provide prospective jurors with orientation prior to the selection process so they may understand their role in our legal system. Jury orientation shall include a standard presentation recommended by the Indiana Judicial Conference.

RULE 12 RECORD SHALL BE MADE

Unless otherwise agreed by the parties, jury selection shall be recorded including all sidebar conferences.

RULE 13 JURY PANEL: OATH OR AFFIRMATION BY PROSPECTIVE JURORS

The jury panel consists of those prospective jurors who answered their summons by reporting for jury service. The judge shall administer the following to the prospective jurors of the jury panel: "Do you swear or affirm that you will honestly answer any question asked of you during jury selection?"

RULE 14 INTRODUCTION TO CASE

(a) After welcoming the jury panel, the judge shall introduce the panel to the case. The judge's introduction to the case shall include at least the following:

(1) Introduction of the participants;
(2) The nature of the case;

(3) The applicable standard of proof;
(4) The applicable burden(s) of proof;
(5) The presumption of innocence in a criminal case;
(6) The appropriate means by which jurors may address their private concerns to the judge;
(7) The appropriate standard of juror conduct;
(8) The anticipated course of proceedings during trial; and
(9) The rules regarding challenges.

(b) To facilitate the jury panel's understanding of the case, with the court's consent the parties may present brief statements of the facts and issues (mini opening statements) to be determined by the jury.

RULE 15 EXAMINATION OF THE JURY PANEL

Examination of jurors shall be governed by Trial Rule 47(D).

RULE 16 NUMBER OF JURORS

(a) In all criminal cases, if the defendant is charged with: murder, a Class A, B, or C felony, including any enhancement(s), the jury shall consist of twelve (12) persons, unless the parties and the court agree to a lesser number of jurors. If the defendant is charged with any other crime, the jury shall consist of six (6) persons. The court shall determine the number of alternate jurors to be seated. The verdict shall be unanimous.

(b) In all civil cases, the jury shall consist of six (6) persons, unless the parties agree to a lesser number of jurors before the jury is selected. The verdict shall be unanimous, unless the parties stipulate before the verdict is announced that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury. The number of alternate jurors shall be governed by Trial Rule 47(B).

RULE 17 CHALLENGE FOR CAUSE

(a) In both civil and criminal cases the parties shall make all challenges for cause before the jury is sworn to try the case, or upon a showing of good cause for the delay, before the jury retires to deliberate. The court shall sustain a challenge for cause if the prospective juror:

(1) is disqualified under rule 5;

(2) served as a juror in that same county within the previous three hundred sixty-five (365) days in a case that resulted in a verdict;

(3) will be unable to comprehend the evidence and the instructions of the court due to any reason including defective sight or hearing, or inadequate English language communication skills;

(4) has formed or expressed an opinion about the outcome of the case, and is unable to set that opinion aside and render an impartial verdict based upon the law and the evidence;

(5) was a member of a jury that previously considered the same dispute involving one or more of the same parties;

(6) is related within the fifth degree to the parties, their attorneys, or any witness subpoenaed in the case;

(7) has a personal interest in the result of the trial;

(8) is biased or prejudiced for or against a party to the case; or

(9) is a person who has been subpoenaed in good faith as a witness in the case.

(b) In criminal cases the court shall sustain a challenge for cause if the prospective juror:

(1) was a member of the grand jury that issued the indictment;

(2) is a defendant in a pending criminal case;

(3) in a case in which the death penalty is sought, is not qualified to serve in a death penalty case under law; or

(4) has formed or expressed an opinion about the outcome of the case which appears to be founded upon

a. a conversation with a witness to the transaction;

b. reading or hearing witness testimony or a report of witness testimony.

(c) In civil cases the court shall sustain a challenge for cause if the prospective juror is interested in another suit, begun or contemplated, involving the same or a similar matter.

RULE 18 NUMBER OF PEREMEPTORY CHALLENGES

(a) In criminal cases the defendant and prosecution each may challenge peremptorily:

(1) twenty (20) jurors in prosecutions where the death penalty or life without parole is sought;

(2) ten (10) jurors when neither the death penalty nor life without parole is sought in prosecutions for murder, and Class A, B, or C felonies, including enhancements; and

(3) five (5) jurors in prosecutions for all other crimes.

When several defendants are tried together, they must join their challenges.

(b) In civil cases each side may challenge peremptorily three (3) jurors.

(c) In selection of alternate jurors in both civil and criminal cases:

(1) one (1) peremptory challenge shall be allowed to each side in both criminal and civil cases for every two (2) alternate jurors to be seated;

(2) the additional peremptory challenges under this subsection may be used only in selecting alternate jurors; and

(3) peremptory challenges authorized for selection of jurors may not be used in selecting alternate jurors.

RULE 19 OATH OR AFFIRMATION OF THE JURY

After the jury has been selected, but before commencement of the trial, the judge shall administer the following to the jury, including alternate jurors:

"Do each of you swear or affirm that you will well and truly try the matter in issue between the parties, and give a true verdict?"

RULE 20 PRELIMINARY INSTRUCTIONS

(a) The court shall instruct the jury before opening statements by reading the appropriate instructions which shall include at least the following:

(1) the issues for trial;
(2) the applicable burdens of proof;
(3) the credibility of witnesses and the manner of weighing the testimony to be received;
(4) that each juror may take notes during the trial and paper shall be provided, but note taking shall not interfere with the attention to the testimony;
(5) the personal knowledge procedure under Rule 24;
(6) the order in which the case will proceed;
(7) that jurors may seek to ask questions of the witnesses by submission of questions in writing.

(b) It is assumed that the court will cover other matters in the preliminary instructions.

(c) The court shall provide each juror with the written instructions while the court reads them.

RULE 21 OPENING STATEMENT

(a) In criminal cases, the prosecution shall state briefly the evidence that supports its case. The defense may then state briefly the evidence in support of the defense, but has the right to decline to make an opening statement.

(b) In civil cases, the party with the burden of going forward may briefly state the evidence that supports its case. The adverse party may then briefly state the evidence in support of its case.

RULE 22 PRESENTATION OF EVIDENCE

Unless the court otherwise directs, the party with the burden of going forward shall produce evidence first, followed by presentation of evidence by the adverse party.

The parties may then respectively offer rebuttal evidence only, unless the court, for good cause shown, permits them to offer evidence upon their original case.

RULE 23 JUROR TRIAL BOOKS

In both criminal and civil cases, the court may authorize the use of juror trial books to aid jurors in performing their duties.

Juror trial books may contain:
(a) all given instructions;
(b) information regarding the anticipated trial schedule;
(c) witness lists; and
(d) copies of exhibits admitted for trial.

RULE 24 PROCEDURE FOR JUROR WITH PERSONAL KNOWLEDGE IN CRIMINAL CASES

If the court receives information that a juror has personal knowledge about the case, the court shall examine the juror under oath in the presence of the parties and outside the presence of the other jurors concerning that knowledge.

If the court finds that the juror has personal knowledge of a material fact, the juror shall be excused, and the court shall replace that juror with an alternate. If there is no alternate juror, then the court shall discharge the jury without prejudice, unless the parties agree to submit the cause to the remaining jurors.

RULE 25 JURY VIEW

When the court determines it is proper, the court may order the jury to view:

(a) the real or personal property which is the subject of the case; or
(b) the place in which a material fact occurred.

The place shall be shown to the jury by a person appointed by the court for that purpose.
While the jury is absent for the view, no person, other than the person appointed to show the place to the jury, shall speak to the jury on any subject connected with the trial.

RULE 26 FINAL INSTRUCTIONS

The court shall read appropriate final instructions, providing each juror with written instructions before the court reads them. Jurors shall retain the written instructions during deliberations. The court may, in its discretion, give final instructions before and after final arguments.

RULE 27 FINAL ARGUMENTS

When the evidence is concluded, the parties may, by agreement in open court, submit the case without argument to the court or jury trying the case.

If the parties argue the case to the jury, the party with the burden of going forward shall open and close the argument. The party which opens the argument must disclose in the opening all the points relied on in the case. If, in the closing, the party which closes refers to any new point or fact not disclosed in the opening, the adverse party has the right to reply to the new point or fact. The adverse party's reply then closes the argument in the case.

If the party with the burden of going forward declines to open the argument, the adverse party may then argue its case. In criminal cases, if the defense declines to argue its case after the prosecution has made opening argument, then that shall be the only argument allowed in the case.

In criminal cases, the party with the burden of going forward is the prosecution. In civil cases, the party with the burden of going forward is the plaintiff.

RULE 28 ASSISTING JURORS AT AN IMPASSE

If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate.

RULE 29 SEPARATION DURING DELIBERATION

(a) The court, in its discretion may permit the jury in civil cases to separate during deliberations. However, before the jurors are permitted to separate, the court shall instruct them that while they are separated, they shall:

(1) not discuss the case among themselves or with anyone else;
(2) not talk to the attorneys, parties, or witnesses;
(3) not express any opinion about the case; and
(4) not listen to or read any outside or media accounts of the trial.

(b) The court shall not permit the jury to separate during deliberation in criminal cases unless all parties consent to the separation and the instructions found in section "a" of this rule are given.

RULE 30 JUDGE TO READ THE VERDICT

When the jury has agreed upon its verdict, the foreman shall sign the appropriate verdict form. When returned into court, the judge shall read the verdict. The court or either party may poll the jury. If a juror dissents from the verdict, the jury shall again be sent out to deliberate.

These amendments shall take effect January 1, 2003.

The Clerk of this Court is directed to forward a copy of this order to the Clerk of each Circuit Court in the state of Indiana; Attorney General of Indiana; Legislative Services Agency and its Office of Code Revision; Administrator, Indiana Supreme Court; Administrator, Indiana Court of Appeals; Administrator, Indiana Tax Court; Public Defender of Indiana; Indiana Supreme Court Disciplinary Commission; Indiana Supreme Court Commission for Continuing Legal Education; Indiana Board of Law Examiners; Indiana Judicial Center; Division of State Court Administration; the libraries of all law schools in this state; the Michie Company; and the West Group.

The West Group is directed to publish this Order in the advance sheets of this Court.

The Clerks of the Circuit Courts are directed to bring this Order to the attention of all judges within their respective counties and to post this Order for examination by the Bar and general public.

DONE at Indianapolis, Indiana, this _____ day of December, 2001.

_____
Randall T. Shepard
Chief Justice of Indiana

Shepard, C.J., and Dickson and Boehm, JJ., concur.

Sullivan and Rucker, JJ., concur except as to the inclusion of Rule 28 from which they dissent.

COURTS in the Classroom

Curriculum Concepts and Other Information on Indiana's Courts for the K-12 Educator

www.IN.gov/judiciary/education/

Ira C. Ritter and The Kroger Co. v. Jerry and Ruth Stanton

Lesson 3: Oral Arguments On-Line

A lesson plan for secondary teachers on conducting mock oral arguments*

*The staff of the judicial branch chose this case as a useful tool to teach an interesting aspect of the law. Its selection has no bearing on how the case will ultimately be decided. Since the members of the Court did not participate in the preparation of the lesson plan, the issues raised in it will not necessarily be addressed in the oral argument.

Background:
Teachers should ask their students to read the case summary and the briefs of the appellants (Ira C. Ritter and the Kroger Co.) and the appellees (Jerry and Ruth Stanton), and to watch the one-hour webcast of the November 14, 2001 oral argument before the Indiana Supreme Court for *Ritter v. Stanton.* All of these resources are all available on-line at http://www.in.gov/judiciary/education/cotm.html

A glossary of legal terms used in this and other Courts in the Classroom lesson plans is attached and is available on-line as well at http://www.in/gov/judiciary/education/glossary.html

Learning Objectives:
At the end of this lesson students should be able to:

1. Conduct a mock oral argument based on the briefs provided and further research as assigned by the instructor;
2. Articulate and differentiate between the arguments made by opposing counsel in an oral argument; and
3. Write an opinion for the case outlining why one legal argument prevailed over the other based on their reading, research, and viewing of the oral argument.

Learning Activities:
Note: The order of these activities is arbitrary. A teacher might decide to have their class watch the oral argument first, and then conduct a mock hearing, or vice versa. In the event that you would like students to watch another oral argument yet remain unbiased about this case's content, please return to the main Courts in the Classroom [http://www.in.gov/judiciary/education/index.html]website to select an appropriate case.

This lesson plan was written by Elizabeth R. Osborn, Special Assistant to the Chief Justice for Court History and Public Education. If you have any questions about this lesson, or ORAL ARGUMENTS ONLINE, feel free to contact her at (317) 233-8682 or cosborn@courts.state.in.us.

1. Teachers should ask their students to read the case briefs and the case summary for *Ritter v. Stanton*. Divide the class into several groups: the appellant (Ritter and Kroger), the appellees (Mr. and Mrs. Stanton), and the court officers (a bailiff, timer, and a panel of five justices). Each group will be assigned the task of preparing for a different part of the oral argument.

2. Students can use the information they gathered in Activity 1 in order to conduct a mock oral argument. (The information provided in the October 2001 Case of the Month: Lesson 1 might be helpful for this exercise as well). Those assigned to act as judges should read the briefs and research the cases the attorney's rely on most heavily in the briefs. (Recent Indiana court opinions [http://www.in.gov/judiciary/opinions/archive.html] can be accessed online. Libraries that carry the Indiana Cases volumes will have all Indiana cases.) Student judges might also prepare questions to ask the attorneys. Those acting as attorneys (and their staff of law clerks) should prepare an argument for the court. A judge may interrupt at any time with a question. Some judges are very active questioners, as exemplified by the panel in the *Ritter* case.

3. Watch the oral argument in the case of *Ritter v. Stanton*. Students should take notes on the arguments made by each attorney. How well did they present the information outlined in their briefs? Have they presented any new arguments? Did the justices ask many questions? How would you characterize their questions? What issues did the justices seem particularly interested in pursuing?

4. After watching the *Ritter* oral argument, or conducting your own mock argument, ask students to write an opinion for the case. You may ask them to write a majority opinion, a concurring opinion, or a dissent. Make sure the students address the specific legal argument under discussion. They should not give their feelings about the case. Instead, they should come to a conclusion based on the facts presented and legal precedents. Recent and current Indiana Supreme Court and Court of Appeals opinions [http://www.in.gov/judiciary/opinions/search.html] are archived on the judiciary website if you wish to provide your students with sample opinions. When this case is decided we will provide a link from the November 2001 Case of the Month.

For Further Study

Oral arguments are heard regularly by the Indiana Supreme Court, the Court of Appeals, and the Tax Court. Teachers might consider bringing a class to tour the State House and to watch an oral argument. To arrange a special tour of the courtroom or to check on upcoming oral arguments please contact Elizabeth Osborn at (317) 233-8682 or eosborn@courts.state.in.us. Guided tours of the State House can be arranged through the tour office at (317) 233-5293 or captours@idoa.state.in.us.

The legal links [http://www.in.gov/judiciary/research/links.html] menu on the Judicial System's homepage provides a wide variety of resources for students and teachers. From this site teachers can link to opinions handed down by Indiana and federal courts, publications and contact information for local and national bar associations, Indiana law schools, and other sites containing legal resources.

If you are interested in viewing an oral argument from another state Supreme Court consider visiting Florida's court website at http://www.flcourts.org/

This lesson plan was written by Elizabeth R. Osborn, Special Assistant to the Chief Justice for Court History and Public Education. If you have any questions about this lesson, or ORAL ARGUMENTS ONLINE, feel free to contact her at (317) 233-8682 or eosborn@courts.state.in.us.

Related Indiana Social Studies Standards

U.S. Government.5.13: Practice civic skills and dispositions by participating in a group of activities such as simulated public hearings, mock trials, and debates.
U.S. Government.3.6: Explain the functions of the courts of law in governments of the United States and the state of Indiana with emphasis on the principles of judicial review and an independent judiciary.

U.S. Government.1.13: Examine fundamental documents in the American political tradition..., the United States Constitution,...the Indiana Constitutions of 1816 and 1851 to identify key ideas regarding the nature of limited government and the protection of individual rights.

This lesson plan was written by Elizabeth R. Osborn, Special Assistant to the Chief Justice for Court History and Public Education. If you have any questions about this lesson, or ORAL ARGUMENTS ONLINE, feel free to contact her at (317) 233-8682 or cosborn@courts.state.in.us.

Glossary

Alternative Dispute Resolution: a way to settle a case without going to court; sometimes ADR is court ordered. Mediation and arbitration are examples of alternative dispute resolution.

Appeal: a proceeding undertaken by one of the parties in a lawsuit asking to have a decision reconsidered by a higher court or agency.

Appellant: the party who brings the appeal; usually the person who is unhappy with the lower court's decision.

Appellee: the person against whom the appeal is lodged; usually wants the lower court's decision to be upheld.

Bench Trial: a trial in which there is no jury and the judge decides the case.

Civil Suit: a case relating to private rights and remedies that are sought in court. Separate from criminal cases.

Compensatory damages: damages that are awarded to compensate an injured person for the actual (proven) injury or loss. Punitive damages are awarded in addition to actual damages when the intent is to punish the guilty party for an action.

Concurring opinion: an appellate court opinion that agrees with the vote (opinion) of the majority, but for a different reason. The concurring justice(s) write a separate opinion explaining how they reached their decision.

Criminal: a case in connection with the commission of a crime.

Defendant: the person who is charged with a crime (criminal case) or against whom damages are sought (civil case).

Denial of transfer: the court's refusal to grant a request for a motion or petition to "transfer" or take a case from a lower court.

De novo: to begin anew; for example, to have a new trial.

Dissenting opinion: an opinion written by one or more judges who disagree with the majority.

Direct appeal: a case that, if appealed, moves directly from the trial court to the supreme court; it bypasses intermediate appellate courts.

Effective January 1, 2001 the court must take on direct appeal death penalty cases, and they have chosen to allow direct appeals if the sentence was life without parole.

Grand Jury: a group of citizens who decide whether or not there is enough evidence to charge a suspect with a crime.

Interlocutory appeal: an appeal that occurs in the course of a trial; it is made before the trial court reaches a decision. During the interlocutory appeal, the trial is placed on hold so to speak.

Jury: a group of citizens chosen to hear a case and render a verdict based on the facts presented to them. Sometimes referred to as a "petit jury."

Jury Trial: often referred to as "trial by jury," this is a trial in which a jury tries the facts.

Note: The U.S. and Indiana Constitution's are not identical on this issue. The Indiana Constitution (Article 1 section 19) provides for a trial by jury in all criminal cases. Under the U.S. Constitution, however, "The right to a jury trial is established...but it is not an absolute right. The Supreme Court has stated that petty crimes (as those carrying a sentence of up to 6 months) do not require trial by jury. The right to a jury trial in a criminal case may be waived by the ``express and intelligent consent'' of the defendant...There is no right to a jury trial in equity cases. When a civil case involves both legal and equitable issues or procedure, either party may demand a jury trial (and failure to do so is taken as a waiver), but the judge may find that there is no right to jury trial because of equitable issues or claims." [http://www.FindLaw.com/ (choose the legal dictionary)]

Libel: harmful remarks, made in writing, that might injure a person's reputation (could also be in a picture sign, etc.). Slander refers to the same type remarks that are made verbally.

Majority opinion: an opinion that is signed by more then half of the judges considering a case. Sometimes it is called the main opinion.

Medical malpractice: a case involving a doctor's alleged failure to provide care at an acceptable level.

Opinion: a court's written explanation of its decision in a case. Not all opinions, however, are published.

Non-published opinions may be requested by contacting the Clerk's Office at (317) 232-1930. Published opinions for recent Indiana Court

of Appeals and Supreme Court cases can be found online at http://www.in.gov/judiciary/opinions/.

There are different types of opinions issued by the court, see also concurrent, dissenting and majority opinion.

Oral arguments: the presentation of information before an appellate court. Either the appellants or the appellees may request to make oral arguments before the court. The court does not have to agree to hear oral arguments; they may feel that the written record is sufficient. On the other hand, they may request that the representatives of each party present oral arguments.

Peremptory Challenge: a request by an attorney for either side to disqualify a juror; the attorney does not have to give a reason for his request. The number of peremptory challenges varies depending on the kind of case. Attorneys are also allowed to request that a juror be dismissed for cause. In a challenge for cause the attorney argues that the juror would not be able carry out his/her duties for some reason specified by the attorney.

Petition: a formal written request made to a court.

Petition to transfer: a request to the court, asking them to accept jurisdiction over a case.

Petit Jury: *see* jury

Plaintiff: The person who initiates a civil lawsuit.

Post-conviction relief: a request by a prisoner asking the court to nullify, cancel or correct a sentence.

Prosecution: in criminal cases it is the state (government) that initiates the case; they are referred to as the prosecution. In a civil case the person who initiates the case is called the plaintiff.

Punitive damages: punitive damages are awarded in addition to actual damages when the intent is to punish the guilty party for an action. They are generally awarded when it has been determined that the defendant acted with recklessness, malice, or deceit.

Remit: the court's reduction of the damages awarded in a jury trial.

Slander: harmful remarks that might injure a person's reputation that are made verbally. Libel refers to similar remarks that are made in writing, pictures, etc.

Statute of limitations: a legally established time limit (based on the date of the claim for civil cases or the crime for criminal cases) for entering a suit (civil) or beginning a prosecution (criminal). A reasonable time limit is established so that the defendant may still be able to find witnesses, evidence, etc. pertinent to the case.

Summary judgment: a judgment issued by a judge where there is agreement about a set of relevant facts. It is a procedural device that allows for the speedy resolution of some controversies without the need for a trial.

Toll: to stop the running of time, especially regarding time allowed before filing a lawsuit. See, statute of limitations.

Tort: a civil wrong; the remedy that is sought is usually a monetary award for damages

*This glossary is provided to help teachers and students gain a working knowledge of some of the terms used in our lesson plans; it is not intended to be a comprehensive legal dictionary.

The Find Law legal website is an invaluable tool for all people working with the law (http://www.findlaw.com/). The Find Law site includes access to a legal dictionary (http://dictionary.lp.findlaw.com/).

Voir Dire: the act or process of questioning prospective jurors, by the trial counsel or the trial judge, to determine which are qualified for service on a jury.

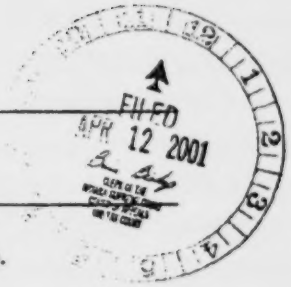
Case Summary: Ira C. Ritter and the Kroger Co. v. Jerry Stanton and Ruth A. Stanton

Jerry Stanton was injured after being pinned between two semi-tractor trailers, one of which was driven by Ira Ritter, an employee of Kroger. Stanton was employed by Gateway Freightline Corporation, a wholly-owned subsidiary of Kroger. Stanton filed a personal injury action against Ritter and Kroger in the Marion Superior Court. The courts below decided that worker's compensation was not Stanton's exclusive remedy. In addition, the courts below decided that the net $55 million verdict in favor of Stanton was not excessive and that courts do not compare one verdict to another in deciding whether one is excessive. See Ritter v. Stanton, 745 N.E.2d 828 (Ind. Ct.App. 2001). Kroger petitions to transfer jurisdiction to the Indiana Supreme Court.

Attorney for Appellants: Karl L. Mulvaney, Indianapolis.

Attorney for Appellees: Thomas Hamer, Anderson.

IN THE
INDIANA SUPREME COURT



NO. _____

IRA C. RITTER and THE KROGER CO.,	)	Indiana Court of Appeals No. 49A02-9912-CV-00883
Appellants (Defendants below),	)	
v.	)	Appeal from the Marion Superior Court, No. 10
JERRY STANTON and RUTH A. STANTON,	)	Cause No. 49D10-9506-CT-0959
Appellees (Plaintiffs below).	)	The Honorable Richard H. Huston, Judge

APPELLANTS' PETITION TO TRANSFER

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Attorneys for Defendants,
Ira C. Ritter and The Kroger Co.

QUESTIONS PRESENTED ON TRANSFER

1. Whether a verdict of $67,468,259 for general damages (pain and suffering) is excessive, and in violation of Indiana's "first blush" test, where it is clearly breathtaking in its enormity, 53 times the proven special damages, and exceeds by tens of millions of dollars any other compensatory damages award for comparable personal injuries?

2. Whether a verdict of $67,468,259 for general damages violates due process and/or due course of law when verdicts rendered for comparable injuries provide no notice to this defendant of the magnitude of the potential award?

3. Whether the trial court had subject matter jurisdiction over a claim that is exclusively within the remedies provided by the workers compensation act because Kroger was Stanton's employer at the time of the accident, either as a single employer or a dual employer.

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I. BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

Appellee Jerry Stanton ("Stanton") sustained serious and permanent personal injuries after being pinned between a trailer and a semi-tractor driven by Ira Ritter ("Ritter"), also an employee of The Kroger Company ("Kroger").[1]

Stanton and his wife filed a Complaint for Damages against Ritter and Kroger for his personal injuries and her loss of consortium. (R. 19-22) Kroger moved to dismiss because the trial court lacked subject matter jurisdiction as Stanton's exclusive remedy was under the Indiana Worker's Compensation Act ("Act"). (R. 372) The trial court denied that motion, and the case was tried to a jury on a claim of negligence against Ritter, and respondeat superior against Kroger. (R. 1649, 2277-2321, 1869, 2336-4075) The jury reached a verdict that included $1,281,741 for special damages, and a stunning $67,468,259 for general damages. The Stantons were awarded $55 million in compensatory damages, after the jury found 20% comparative fault. (R. 1897, 4073) Kroger pursued this appeal after its motion to correct errors was denied. (R. 1928-1950, 4077-4113; 2252)

On March 14, 2001, the Court of Appeals affirmed the entire $55 million verdict in a published opinion, holding that the trial court had subject matter jurisdiction; that the Seventh Amendment constrains post-verdict alteration of a jury award; that the damage award was supported by the evidence; that no comparative analysis of the award with other awards for like injuries was necessary; that the damage award was not outrageous; and that Kroger's constitutional claims were without merit.

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[1] Stanton drove for Gateway Freightline Corporation ("Gateway"), a wholly-owned subsidiary of Kroger. There was a contract between Stanton and Kroger through a collective bargaining agreement with the Teamster's.

II. ARGUMENT

A. THE GENERAL DAMAGES AWARD IS EXCESSIVE

The compensatory damages award included $1,281,741 for special damages, and a stunning $67,468,259 for general damages (disfigurement, pain and suffering, ability to function as a whole person, and loss of consortium). The general damages award clearly fails the "first blush" test. On its face the award is huge. It exceeds proven special damages 53-fold and is many multiples higher than awards for comparable injuries. The award is so great that it indicates it was a product of prejudice, partiality, corruption, or other improper element.

1. The Court Of Appeals Was Obligated To Engage In A Meaningful Review Under The First Blush Test Including Considering Comparable Verdicts

The Court of Appeals erroneously concludes that it could not alter this award. However, the authority to reduce excessive verdicts is a recognized part of Indiana law. Ind. Appellate Rule 66(C)(4) and (5)(N)(5)[2] makes it clear that such authority will be exercised in the right case. *See Hibschman Pontiac, Inc. v. Batchelor*, 266 Ind. 310, 362 N.E.2d 845 (1977). This is the right case. By any measure, the verdict is excessive and must be reduced.

An award of compensatory damages will be set aside as excessive where the amount of damages is so great it cannot be explained upon any basis other than passion, partiality, prejudice, corruption, or some other improper element. *See Dollar Inn, Inc. v. Slone*, 695 N.E.2d 185, 190 (Ind.Ct.App. 1998), *transfer denied*; *see also Sanders v. City of Indianapolis*, 837 F.Supp. 959, 966 (S.D.Ind. 1992). To warrant reversal, the award "must appear to be so outrageous as to impress the Court at 'first blush' with its enormity." *Kimberlin v. DeLong*, 637 N.E.2d 121, 129 (Ind. 1994), *cert. denied*, 516 U.S. 829 (1995).

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[2] Formerly App.R. 15(N)(5).

To determine whether a compensatory damages award is monstrously excessive, a number of courts have conducted a "comparability analysis," by which they assess whether the award is comparable to awards in factually similar cases. *See*, e.g., *U.S. E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1285 (7th Cir. 1995). Indiana has done the same in both the punitive damages context and in evaluating emotional distress damages. *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 562 (Ind.Ct.App. 1999), *transfer denied*; *cert. denied*, 120 S.Ct. 1424 (2000); *Groves v. First Nat'l Bank of Valparaiso*, 518 N.E.2d 819 (Ind.Ct.App. 1988), *transfer denied*. Even if a "comparability analysis" does not control assessment of individual circumstances, it can provide an objective frame of reference. *Wheat v. United States*, 860 F.2d 1256, 1259 (5th Cir. 1988).

2. The 7th Amendment Does Not Preclude A Consideration Of Verdicts In Comparable Cases

The Court of Appeals' Opinion erroneously concludes that the 7th Amendment constrains the ability to perform a post-verdict alteration of the award. (Opinion, p. 26) However, the 7th Amendment cannot constrain judicial review of this state court verdict because the 7th Amendment governs proceedings in federal court, not state court. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S.Ct. 2211, 2222 (1996), citing *Walker v. Sauvinet*, 92 U.S. 90, 92 (1876). Nevertheless, under a 7th Amendment analysis, the U.S. Supreme Court has found that the "fair administration of justice" must be balanced against the right to jury trial found in the 7th Amendment. *Gasperini*, 116 S.Ct. at 2223. The Supreme Court has also found that jury discretion must have an "upper limit". *Id.*

Moreover, federal courts have recognized that a comparability analysis should be employed where a verdict is "monstrously excessive" and materially deviates from prior, similar verdicts. *See*, e.g., *Miksis v. Howard*, 106 F.3d 754 (7th Cir. 1997); *Sanders v. City of*

Indianapolis, 837 F.Supp. at 966. Thus, the Court of Appeals' Opinion conflicts with federal decisions and significantly departs from 7th Amendment law. App.R. 57(H)(3), (6). Although Kroger demonstrated how this award materially deviates from comparable circumstances and awards, the Court of Appeals declined to engage in the precise analysis found to be appropriate under the 7th Amendment.

3. The Court of Appeals Ignored Comparable Cases That Reflect Substantially Lower Awards[3]

The size of this verdict warrants a remittitur or a new trial. Kroger recognizes that "[t]raditionally, the jury is afforded a great deal of discretion in assessing damage awards." *Slone*, 695 N.E.2d at 190. A jury's discretion in determining damages however, "is not limitless." *Slone*, 695 N.E.2d at 190. Where an award is so great that it indicates prejudice, partiality, corruption, or other improper element, it is excessive, and should be reduced. *Id.*

The burden of proving the amount of damages rests with the plaintiff. *Daly v. Nau*, 167 Ind.App. 541, 339 N.E.2d 71, 78 (1975). In addition to incurring $1,281,741 in special damages, Stanton proved he was entitled to general damages for disfigurement; loss of ability to function as a whole person, and for pain and suffering. Plaintiffs also demonstrated that Stanton's wife suffered a loss of consortium. The issue is whether the jury's award of $67,468,259 for these losses is excessive. The general damages awarded in this case are huge. The award is roughly

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[3] Certainly, there are much lower verdicts for similar serious injuries. Kroger has restricted its review to those cases that have the **highest** awards for similar injuries.

53 times the amount of proven special damages.[4] It far exceeds comparable cases. The award is clearly the product of some improper element and should be reduced.[5]

Though it is difficult to compare injuries and damages from one case to the next, a recognized method to assess whether damages are excessive is to use a comparability analysis. *Littlefield v. McGuffey*, 954 F.2d 1337, 1348 (7th Cir. 1992). Although individual circumstances will differ, a "comparability analysis" can provide an objective frame of reference. *Wheat v. United States*, 860 F.2d at 1259. There are few reported cases in Indiana in which juries have awarded compensatory damages in excess of $4,000,000 for grievous injuries.

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[4] Kroger does not suggest a multiple of special damages, standing alone, is dispositive of an excessiveness issue. It may be, however, a guide in determining reasonableness and a fair award.

[5] One explanation for the size of the verdict is Stantons' counsel's closing argument. Prior to trial, Stantons' counsel conceded there was no factual basis for punitive damages. (R. 49) However, at trial counsel inflamed passion against Kroger and inferred that Kroger should be punished:

> There's another truck poised and ready to crush Jerry Stanton. And the only thing that's going to stop Kroger from running over him a second time are the six of you. Because that's what they [Kroger] intend to do ... .

(R. 3980)

> They're [Kroger] going to ask you to join in getting in the cab of that truck and running over Jerry a second time. ... Make no mistake about it that's what they intend to do.

(Id.)

This closing argument was a direct invitation to the jury to ignore the law and punish Kroger or to base its award on sympathy. Plaintiffs' closing statements were made despite knowing the jury would be instructed that Kroger would be liable, if at all, under a respondeat superior theory. (R. 1869) While courts usually see nothing "unfair" in comments of counsel to persuade a jury, they do not accept "deliberate distortions." *White v. State*, 541 N.E.2d 541, 549 (Ind.Ct.App. 1989); *see also Budget Car Sales v. Stott*, 656 N.E.2d 261 (Ind.Ct.App. 1995), *transfer denied*, (argument referencing letter not in evidence was improper); *CSX Transp. Inc. v. Levant*, 417 S.E.2d 320 (Ga. 1992), (reversed $1,000,000 general damages award after a similar closing argument because it "could only be explained as having a punitive cause" and the verdict raised "an irresistible inference that . . . [a]n improper cause invaded the trial.").

How does the award of $67,469,259 in general damages compare to other cases? No verdict for general damages even comes close. In fact, rarely have awards of special damages and general damages exceeded $8 million.

In *Miksis v. Howard*, a 21-year-old worker in a bucket truck was struck by a tractor-trailer. *Miksis v. Howard*, 106 F.3d 754 (7th Cir. 1997). The plaintiff sustained brain damage, lost the ability to control his legs, could not eat or breathe without assistance, was unable to speak or walk, and was incontinent. Although he regained some of his mobility, he continued to experience difficulty balancing, had only limited movement in his legs and left arm, and had deficits in auditory comprehension, memory, the ability to process information, and problem solving. Miksis claimed $830,000 in past medical expenses. The jury awarded $10,000,000, but like here assessed 20% comparative fault, thereby reducing the award to $8,000,000. Assuming that 80% of special damages were awarded, the remainder ($7,336,000) was for general damages and would have a present value of $8,019,540.[6]

In *Dayton Walther Corp. v. Caldwell*, 273 Ind. 191, 402 N.E.2d 1252, 1254-55 (1980), a 21-year-old woman was severely injured in a head-on collision. She suffered traumatic injuries to her face and head, including a fractured skull. Forty grams of brain tissue were removed. Bone structures, muscles, and nerves around the eyes, nose, and sinuses were destroyed. She lost her sense of smell and taste, 59% of her sight, and suffered from permanent pain, headaches, and facial scarring. The jury awarded $800,000 in compensatory damages. In today's dollars, the award would be worth $1,835,813.

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[6] Adjustments for inflation were calculated using the inflation calculator found on the Bureau of Labor Statistics website, http://stats.bls.gov/cpihome.htm.

In *Bernard v. Roy Ins. Co.*, 586 So.2d 607 (La.Ct.App. 1991), the plaintiff's leg got trapped in the door of a bus as she attempted to board. The bus dragged her and then ran over her right leg. Her thigh "burst open". Her leg was mutilated and nearly torn from her body. Bernard believed she might bleed to death. She was hospitalized for months and underwent innumerable surgeries, skin and muscle grafts, and debridements. Bernard had constant pain after the accident, a romantic relationship ended, and she suffered from general depression. The jury returned a verdict of $14,148,594. Recognizing excessiveness review standards similar to Indiana's, the Louisiana Court of Appeals found the verdict was excessive. *Id.* at 612. The Court reduced the $6,525,000 general damages award to $5,025,000, finding it was "the largest award within the factfinder's discretion." *Id.* at 619. The Stantons' general damages exceed Bernard's by well over thirteen (13) times for injuries (including pain and suffering) of the same character. Even adjusting the $5,025,000 award to reflect today's dollars ($6,405,240), the verdict here is still more than ten (10) times that amount.

A New York appellate court also reduced an excessive award for injuries comparable to those sustained in this case. In *Chung v. New City Transit Authority*, 583 N.Y.S.2d 476 (N.Y.App.Div. 1992), a verdict of $61,266,600 was awarded. Plaintiff's legs were severed by a subway after he fell from a platform. Total damages were reduced to $2,785,600, with $1,300,000 for future and past pain and suffering. The $1,300,000 general damages component has a present value of $1,657,080.

In its Briefs to the Court of Appeals, Kroger cited to similar cases where the injuries sustained were similar to or arguably more devastating than those presented here. (*See* Brief of Appellants, pp. 33-39) In addition, in its Motion to Correct Errors, Kroger presented research on awards and settlements in Indiana from recent years for cases involving paraplegia, quadriplegia,

and brain damage. (R. 2096 *et seq.*) Present value of the awards ranged in size from $100,000 to $8,500,000. Finally, Kroger cited to its review of jury verdicts from 1995-1999 that disclosed that in cases where juries awarded total damages in excess of $1 million to a husband and wife for injuries the husband received in a vehicular accident and for the wife's loss of consortium, the average total award was slightly under $4 million, and the highest award was $7,889,000 ($6,960,000 for pain and suffering), plus $696,000 for loss of consortium. *Thomas v. Brown*, 1997 WL 636031 (Gadsden County Circuit Court, Fla., 1997). In today's dollars, the general damages award would be $7,946,972. The highest loss of consortium award reported was $2 million. *Neill v. Wal-Mart Stores, Inc.*, 1999 WL 1495259 (Dallas County, Tex., 1999). (*See* chart summarizing awards for comparable injuries, Brief of Appellants, pp. 38-39).

The general damage and consortium award to the Stantons is nearly nine (9) times the highest amount awarded during the last five years to a husband and wife for injuries received in a vehicular accident. Moreover, the award is more than nine (9) times the highest Indiana verdict. The size of this award has only occurred in the case of punitive damages or proven life care expenses (not the case here). *See*, e.g., *Ammerman*, 705 N.E.2d 539 (total verdict of $62.4 million, including $58 million in punitive damages, $1,251,757 in special damages, and $3,150,000 general damages).

Although the nature of the injuries justifies a large damage award, any award of compensatory damages must be reasonable as the jury was instructed. (R. 1880) Even if Stanton's physical injuries were the worst reported, a total award of $15,000,000 would exceed by several million dollars any comparable general damages judgment in Indiana. Such an award would be "the largest award within the factfinder's discretion." *See Bernard*, 586 So.2d at 619.

When a court on appeal finds that a verdict violates the "first blush" test and/or that the trial court abused its discretion in not granting remittitur, the Court has the authority under Appellate Rule 66(C)(4) and (5) to fashion a remedy. The use of remittitur by trial and appellate courts to set aside verdicts that are "clearly disproportionate to community expectations" is a recommended method of controlling unrealistic awards. American Bar Assoc., *Report of the Action Commission to Improve the Tort Liability System*, 13 (1987). This Court should order a new trial or a new trial subject to remittitur.

B. A JUDGMENT FOR GENERAL DAMAGES OF THIS SIZE VIOLATES DUE PROCESS AND DUE COURSE OF LAW CONSTITUTIONAL PROTECTIONS

The unfettered right to a jury trial in civil cases does not equate to a jury's unfettered right to award any amount of damages. A jury's discretion in determining damages "is not limitless." *Slone*, 695 N.E.2d at 190. T.R. 59(J)(5) and App.R. 66(C) give courts the legal duty to remit excessive damages, yet these long-standing rules were not even addressed by the Court of Appeals' Opinion. If review demonstrates that a defendant "did not receive adequate notice of the magnitude of the sanction", due process indicates that the verdict is excessive. *See Ammerman*, 705 N.E.2d at 562.

This award violates due process protection afforded by the 14th Amendment and due course of law protection afforded by Art. 1, § 12 of the Indiana Constitution. No previous general damage verdict, even for cases with injuries as serious as these, provides any inkling of notice that this verdict was possible or reasonable. Kroger had the right to rely on existing case law which showed the highest comparable verdicts in the range of $3-7.5 million. Kroger had no due process notice that $67,468,259 in general damages was anywhere close to the range of possibility.

If $67,468,259 is the new benchmark for general damages, then even responsible individuals and corporations are grossly underinsured because present coverages are predicated on general damage awards substantially lower than awarded in this case. Recent Indiana decisions reflect the importance of insurance coverage "to avoid unexpected liabilities." *See Hanson v. St. Luke's United Methodist Church*, 704 N.E.2d 1020, 1025 (Ind. 1998). The arbitrariness and resultant unpredictability of a pain-and-suffering award of this magnitude undermine the deterrence function of the tort system and increase insurance costs. Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L.REV. 773, 786 (1995).

There comes a time when appellate courts must step in and declare a judgment to be excessive. This is the time and the judgment. This Court should step in and bring reason to the award. The general damage award must be remitted or a new trial granted.

C. THE COURT OF APPEALS' DECISION ERRONEOUSLY DECIDES A NEW QUESTION OF LAW AND/OR CONTRAVENES RULING PRECEDENT BY NOT APPLYING THE EXCLUSIVITY PROVISION OF THE WORKER'S COMPENSATION ACT

1. Introduction

The trial court lacked subject matter jurisdiction because of the exclusivity provision of the Indiana Worker's Compensation Act ("the Act"). Ind.Code § 22-3-2-6; *Williams v. R.H. Marlin, Inc.*, 656 N.E.2d 1145, 1150 (Ind.Ct.App. 1995). Furthermore, the Act makes it clear that an employee may be "in the joint service of two (2) or more employers" and the employee's remedies remain exclusive under the Act even in such dual situations. Ind.Code § 22-3-3-31; *see DeGussa Corp. v. Mullins*, 2001 WL 267766 (Ind. 2001).

2. An Employee Of A Wholly Owned Subsidiary With An Employment Contract With The Parent Is An Employee Of The Parent

Prior to 1995, when employees of a parent and subsidiary corporation injured each other during their employment, the fact that the corporations were interconnected often resulted in a finding that worker's compensation was the sole and exclusive remedy. *See*, e.g., *U.S. Metalsource Corp. v. Simpson*, 649 N.E.2d 682 (Ind.Ct.App. 1995). In 1995, this Court decided *McQuade v. Draw Tite, Inc.*, 659 N.E.2d 1016 (Ind. 1995), which found that interconnectedness of a parent and subsidiary alone could no longer support a finding that the employees of a parent and a subsidiary were the employees of a single employer. Thus, an employee of a subsidiary could sue the employee of the parent, and the parent, for negligence. This Court concluded: "there is little likelihood that equity will ever require us to pierce the corporate veil to protect the same party who erected it." *McQuade*, 659 N.E.2d at 1020.

Nevertheless, this Court also stated: "Defendant does not claim that it had an express or implied employment contract with Plaintiff. Rather, its claim is based solely on interconnectedness with [its subsidiary]." *McQuade*, 659 N.E.2d at 1019, n.4. In raising the exclusivity provision of the Act, Kroger does not rely solely on the substantial interconnectedness[7] with Gateway. (Appellants' Brief, pp. 14-17) In addition, Kroger had an employment contract with Stanton in the form of a collective bargaining agreement.

While the Court of Appeals found a level of interconnectedness, it opined that it was unsure this Court meant to create an exception to *McQuade*. (Opinion, p. 13-15) Further, the Court of Appeals found no express employment contract, but was silent on the question of whether there was an implied employment contract. The Opinion concluded that a collective

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[7] The facts demonstrating interconnectedness are found in Kroger's Briefs filed in the Court of Appeals. (Brief of Appellants, pp. 13-17)

bargaining agreement is not always an express or "direct" employment contract, because such contracts are often at-will. (Opinion, p. 18, 22)

The Court of Appeals' conclusion is inapplicable here. Not only did Stanton have substantial benefits under the Kroger Master Agreement (R. 447, 428-30, 484), he also had protection from outsourcing (R. 727), grievance rights (R. 719), and re-employment benefits with full seniority if Kroger closed Gateway. (R. 718, 734) Most importantly, **Stanton was not employed at will, but rather could only be discharged for cause.** (R. 721) Gateway employees ratified the Kroger Master Contract in order to obtain these benefits. (R. 423)

Whether the *McQuade* footnote creates an exception is a dispositive issue that is squarely presented. The facts demonstrate both a high level of interconnectedness between parent and subsidiary and an express or implied employment contract. The Court of Appeals erroneously decided this new question of law.

The maxim that one who accepts the benefits of a contract must bear its burdens applies here. *See Jobes v. Tokheim Corp.*, 657 N.E.2d 145, 150 n.6 (Ind.Ct.App. 1995) (member of union, as recipient of the benefits and protections of collective bargaining agreement, bound by its limitations); *Bentz Metal Products Co., Inc. v. Stephans*, 657 N.E.2d 1245, 1249-50 (Ind.Ct.App. 1995) (employee covered by collective bargaining agreement recognized as party to an at-will employment contract with company); *Moen v. Director of Div. of Employment Sec.*, 85 N.E.2d 779, 781-82 (Mass. 1949) (employee is "bound by the agreement made on his behalf by the union to the same extent as though he had entered into it individually"). Kroger was Stanton's employer within the meaning of *McQuade*.

3. The Opinion Contravenes This Court's Decision In *DeGussa v. Mullens*

The Court of Appeals further held that *McQuade* also precludes a finding of dual employment in the case of a parent and subsidiary. (Opinion, p. 23 n.4) This holding contravenes *DeGussa v. Mullens*, decided two days after the decision in this case. In *DeGussa*, this Court applied the *Hale* dual-employment factors[8] in a parent-subsidiary relationship. *See DeGussa*, 2001 WL 267766, *5-7. If Kroger and Gateway are separate employers under *McQuade*, Kroger must be allowed to show dual employment.

Application of the *Hale* factors was recently refined in *GKN Co. v. Magness*, 2001 WL 244110 (Ind. 2001). In *GKN*, this Court found the *Hale* factors are to be weighed against each other as part of a balancing test. *Id.* at *3.

Application of the *Hale* factors in this case[9] compels a finding of dual employment. Because Kroger wholly owned Gateway, it had the right to indirectly discipline Gateway employees. (R. 483-84) The right to discipline need not be exclusive. *GKN*, at *5. Kroger provided the working capital to fund Gateway's operating budget,[10] including salaries of Gateway drivers, and supplied Gateway with tractors and trailers. (R. 482-84, 770, 1375-79) Kroger prepared the delivery schedule for Gateway drivers, including Stanton. (R. 483, 229) Although Stanton believed he was a Gateway employee, he knew that 99% of his deliveries were for Kroger, that he received Kroger benefits, and that for six months prior to the accident, his

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[8] *Hale v. Kemp*, 579 N.E.2d 63, 67 (Ind. 1991).

[9] Because the trial court did not conduct an evidentiary hearing before ruling on Kroger's motion to dismiss, and thus ruled on a paper record, this Court reviews that ruling *de novo*. *GKN*, 2001 WL 244110 at *3.

[10] All of Gateway's income was transferred to Kroger on a daily basis. (R. 770)

employment was governed by a collective bargaining agreement between Kroger and his union. (R. 423-32, 445-46) These facts clearly establish dual employment under the *GKN* test.

For the above-stated reasons, the exclusive remedy provision should be applied. Transfer should be granted, the Court of Appeals' Opinion vacated, and judgment should be entered for Kroger.

III. CONCLUSION

For the foregoing reasons, Kroger requests that this Court grant transfer, vacate the jury's verdict, and remand with instructions to dismiss the Stantons' Complaint for lack of jurisdiction. In the alternative, Kroger requests that this Court order a new trial or a new trial subject to remittitur.

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IN THE
INDIANA SUPREME COURT

CASE NO._____

IRA C. RITTER and THE KROGER CO.,	)	Indiana Court of Appeals
	)	No. 49A02-9912-CV-00883
Appellants (Defendants below),	)	
	)	Appeal from the
v.	)	Marion Superior Court, No.10
	)	No. 49D10-9506-CT-0959
JERRY STANTON and RUTH A. STANTON,	)	
	)	Honorable Richard H. Huston,
Appellees (Plaintiffs below).	)	Judge

BRIEF IN OPPOSITION TO PETITION TO TRANSFER

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ARGUMENT

I. FULLY SUPPORTED BY THE EVIDENCE, THE VERDICT IS NOT EXCESSIVE

Given the staggering nature of the injuries Jerry Stanton suffered, the pain he endured and will continue to endure, and the devastating impact of those injuries on both his and his wife's lives, the jury's verdict was justifiably large. The trial judge, who heard the testimony and saw the witnesses, and the appellate judges, who meticulously reviewed the record, did not blush but, instead, concluded that the award is within the scope of the evidence.

A. The Court Of Appeals Was Not Obligated To Change The Law Of Indiana And Consider "Comparable" Cases In Reviewing This Verdict.

A jury determination of damages is entitled to great deference when challenged on appeal. *Sears Roebuck & Co. v. Manuilov*, 742 N.E.2d 453, 462 (Ind. 2001). In *Manuilov* this Court stated:

> Damages are particularly a jury determination. Appellate courts will not substitute their idea of a proper damage award for that of the jury. Instead, the court will look only to the evidence and inferences therefrom which support the jury's verdict. We will not deem a verdict to be the result of improper considerations unless it cannot be explained on any other reasonable ground. Thus, if there is any evidence in the record which supports the amount of the award, even if it is variable or conflicting, the award will not be disturbed.

Id. (quoting *Prange v. Martin*, 629 N.E.2d 915, 922 (Ind.Ct.App. 1994), *trans. denied* (citations omitted)).

To warrant reversal, the amount of damages must appear to be so outrageous as to impress the court at "first blush" with its enormity. *Kimberlin v. DeLong*, 637 N.E.2d 121, 129 (Ind. 1994), *cert. denied*, 516 U.S. 829 (1995). However, reversal is not justified if the amount of damages awarded is within the scope of the evidence before the court. *State v. Daley*, 153 Ind.App. 330, 287 N.E.2d 552, 556 (1972). Thus, the correct way to determine whether a verdict

is excessive is to first reconsider the evidence introduced at trial. *See State v. Thompson*, 179 Ind.App. 227, 385 N.E.2d 198, 214 (1979).

Kroger seeks to overturn the "first blush" test standard of review that Indiana courts have used for over 100 years. *See Louisville & N. R. Co. v. Kemper*, 153 Ind. 618, 53 N.E. 931, 936 (1899).[1] Borrowing a "comparability analysis" from other jurisdictions, Kroger would have Indiana courts determine whether a compensatory damages award is excessive by comparing it to awards in factually similar cases. Kroger's claim that Indiana courts have utilized a comparability analysis in both the punitive damages context and in evaluating emotional distress damages is unpersuasive.

The difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases was identified in *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 561-62 (Ind.Ct.App. 1999), *trans. denied, cert. denied*, 120 S.Ct. 1424 (2000), as one of three "guideposts" to determine whether a punitive damages award is grossly excessive. The comparison, however, is between the punitive damages award and the civil statutory or criminal penalties that could be imposed for comparable misconduct. *Id.* at 562. The punitive damage award is not compared to awards in factually similar cases.

In *Groves v. First Nat'l Bank of Valparaiso*, 518 N.E.2d 819 (Ind.Ct.App. 1988), *trans. denied*, the court considered cases from other jurisdictions to determine the extent of evidence required to support mental anguish damages. Based on an absence of evidence of any physical or psychological manifestation of mental anguish, the award was found to be excessive.

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[1] In *Kemper* this Court stated, "Unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and to induce the court to believe that the jury must have acted from prejudice, partiality, or corruption, the court cannot, consistently with the precedents, interfere with the verdict." *Id.* This is the "first blush" test. *See Hines v. Nichols*, 76 Ind.App. 445, 130 N.E. 140, 142-43 (1921); *New York Cent. R.R. Co. v. Johnson*, 234 Ind. 457, 127 N.E.2d 603, 608 (1955).

However, one Indiana court looking to other cases for guidance in evaluating a particular type of damages is not sufficient to overturn Indiana's long history of evaluating compensatory damage awards on the basis of the unique facts of the case under review.

The thirteen page detailed recitation of pertinent evidence from the record is ample proof that the Court of Appeals ("the Court") conducted a meaningful review under the "first blush" test. Applying the correct standard of review, the Court concluded that it would not alter this award because it is not excessive.

B. Indiana Common Law, Not The 7th Amendment, Determines The Correct Method For Analyzing The Reasonableness Of This Verdict.

Kroger urged the Court to ignore Indiana common law and instead evaluate the reasonableness of the verdict using a comparability analysis. To determine the proper method of analysis, the Court reviewed the role of the jury in awarding compensatory damages. The decision not to utilize Kroger's proposed analysis was not based on a conclusion that the 7th Amendment constrains the ability to perform a post-verdict alteration of the award.[2] A review of Indiana caselaw led to the conclusion that Indiana courts have not adopted a comparability analysis for evaluating compensatory damage awards. (Opinion, p. 28, 31)

Indiana has a longstanding tradition of evaluating each case on its own unique facts:

> Each action is unique and must be so treated and determined on the facts peculiar to that matter. Because our law seeks to individualize the solution to the problem of properly compensating the victim of torts, no overall expedient applies in every case.
>
> * * *
>
> Appellant has documented numerous cases to show that the instant judgment far exceeds what as he says 'in Indiana or elsewhere' has been allowed for what he submits to be 'comparable injury'. We are not able to say the loss of an eye in one case is worth the same or just about the same in another case. If such a system is to be desired (and we express no sentiment for such idea) it must come

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[2] Article 1, § 20 of the Indiana Constitution guaranteeing that "[i]n all civil cases, the right to trial by jury shall remain inviolate," restrains appellate review of a verdict challenged as excessive. *See Carbone v. Schwarte*, 629 N.E.2d 1259, 1261 (Ind.Ct.App. 1994).

> from legislation. Our common law requires each case to rest finally on its own merits.

Kavanagh v. Butorac, 140 Ind.App. 139, 221 N.E.2d 824, 828 (1966)(footnote omitted).

Kroger faults the Court for referring to the 7th Amendment constraint on post-verdict alteration of a jury award because the 7th Amendment governs proceedings in federal court, not state court. Kroger then inconsistently also faults the Court for not engaging in a comparability analysis that has been found to be appropriate under the 7th Amendment. Federal courts, applying a federal standard for reviewing damage awards for excessiveness, may utilize a comparability analysis. *See Miksis v. Howard*, 106 F.3d 754, 764 (7th Cir. 1997). The Indiana Court of Appeals does not apply a federal standard of review and, therefore, its Opinion neither decides an important federal question in a way that conflicts with federal decisions nor significantly departs from 7th Amendment law.

C. The Court Of Appeals Correctly Determined That There Are No Cases Comparable To This One.

Prior to the accident Jerry was always hunting, fishing, working on cars, jogging, playing basketball and baseball, camping, and horseback riding. (R. 3005-08; 3014; 3022; 3047-48; 3051; 3085) Alfie and Jerry were "inseparable." (R. 3023) An affectionate, loving couple, they had "a very sexual relationship." (R. 3023; 3086)

On May 6, 1995, as a result of the tractor hitting him, Jerry suffered crush injuries to the pelvis, chest and abdomen and sustained fractured ribs and a lung contusion. (R. 3394-95)

Jerry endured multiple episodes of near-death resuscitation, over 50 surgeries, and 289 days of hospitalization. (R. 3073; 3029-31; 3322-24; 3464; 3563) During his treatment, a ventilator was required to breathe for him and dialysis was required when his kidneys shut down.

(R. 3396) Narcotic pain medication was administered throughout Jerry's hospitalization. (R. 2965; 2960-63)

Reconstructive surgery on his left hip was for naught because Jerry developed severe osteomyelitis (a bone infection) and a massive soft tissue infection. (R. 2967; 2990; 2972-74) Numerous surgeries were required to clear the soft tissue infection and to remove dead muscle, skin, subcutaneous fat, bone fragments and hardware placed in the initial surgery. (R. 2971; 2979; 2987) The osteomyelitis precludes surgery to fix the right side, which is at risk for developing posttraumatic arthritis. (R. 2990; 2979; 2986) Hip replacement is not an option because surgery might reactivate the osteomyelitis. (R. 2985)

Recurrences of infection in the pelvis in 1997 required additional surgeries to clean out the infection, remove more hardware, bone and soft tissue, and resulted in the head of the left femur being removed. (R. 3358, 3560; 3566) Jerry effectively lost the functional use of his legs to walk. (R. 3569)

The damage to Jerry's pelvis rendered him impotent and, despite a penile implant, sexual intercourse has not been possible. (R. 3493-94)

Jerry returns to bed several times a day because of pain. (R. 3014) Three to four times a week he takes Vicodin, a narcotic. (R. 3116)

This short summary of the uncontested evidence on damages, necessitated by length limitations, may erroneously make it appear that this case is indistinguishable from the cases cited by Kroger for comparison. It also illustrates the Court's concern about comparing damage awards to other cases due to the lack of a full explanation of the facts in reported personal injury cases. The Court correctly noted:

> [W]ithout a more thorough description of [Jerry's] injuries, the complications, the effects of the medical problems on his life, and the profound devastation the

> accident has caused him and his family, . . . it would be impossible for any other case to be compared accurately to this one.

(Opinion, p. 35 n. 8)[3] Reasoning that the search for similar cases is inherently flawed, the Court rejected Kroger's invitation to compare this case to others.

Kroger wants this Court to do what the trial court and Court of Appeals declined to do, substitute its judgment for that of the jury. The evidence in the record fully supports the amount of the award and, therefore, the award should not be disturbed. *Manuilov*, 742 N.E.2d at 462.

Kroger also wants this Court to compare this case to others and impose a judicial cap on the reasonable compensation to be awarded to the Stantons.[4] If such a system of comparison is desirable, it must come from legislation. *Kavanagh*, 221 N.E.2d at 828. This Court's rule dealing with the relief available on appeal for excessive damages[5] is not equivalent to the legislation contemplated in *Kavanagh* and does not deprive *Kavanagh* of vitality. A rule specifying the orders that may be entered if an award is excessive is not the same as a rule or statute requiring that the award under review be compared with factually similar cases in order to determine whether the award is excessive.

The Court found no indication that the jury acted out of prejudice, passion, or partiality.[6] Acknowledging that the amount of the award is sizeable, the Court nonetheless could not

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[3] See Appellees' Brief, pp. 22-29 and Opinion, pp. 36-48 for more detailed recitations of the evidence.

[4] It is recommended that there be no ceilings on pain and suffering damages. American Bar Assoc., *Report of the Action Commission to Improve the Tort Liability System*, 13 (1987).

[5] Ind. Appellate Rule 66(C)(4) and (5), replacing App. R. 15(N)(5).

[6] The suggestion that the Stantons' counsels' closing argument inflamed passion against Kroger and inferred that Kroger should be punished was rejected. (Opinion, pp. 48-51) The jury attributing 20% of the fault to Jerry is credible evidence of the jury's objectivity.

conclude that it is outrageous given the evidence. Neither a new trial nor a new trial subject to remittitur is warranted.

II. THE AWARD DOES NOT VIOLATE DUE PROCESS OR DUE COURSE OF LAW.

Kroger contends that if review demonstrates that a defendant "did not receive adequate notice of the magnitude of the sanction," due process indicates that the verdict is excessive. Kroger's contention is unsupported by *Ammerman*, the authority cited.

The *Ammerman* Court's due process analysis was based upon *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), which reaffirms that grossly excessive punitive damages awards -- awards that exceed the amount necessary to vindicate the State's legitimate interest in punishment and deterrence -- violate the due process clause. However, this case involves compensatory damages, not punitive damages. Unlike punitive damages, compensatory damages are not awarded to deter wrongful conduct. Compare *Watson v. Thibodeau*, 559 N.E.2d 1205, 1209 (Ind.Ct.App. 1990)("The purpose of compensatory damages is to award or impose a pecuniary compensation, recompense or satisfaction for an injury done or a wrong sustained by a party.") with *Orkin Exterminating Co., Inc. v. Traina*, 486 N.E.2d 1019, 1022 (Ind. 1986)("Punitive damages are not compensatory in nature but are designed to punish the wrongdoer and to dissuade him and others from similar conduct in the future.")

Kroger cites no authority supporting its claim that due process requires fair notice of the amount of compensatory damages that can be awarded. Indiana's judicial tradition provided Kroger with fair notice that if the jury found it liable for the accident, the Stantons were entitled to be fairly compensated to the full extent of the injuries suffered. *See Kavanagh*, 221 N.E.2d at 828.

According to Kroger, if this general damages award is the new benchmark for general damages, "then even responsible individuals and corporations are grossly underinsured because present coverages are predicated on general damage awards substantially lower than awarded in this case." (Pet., p. 10) First, it is significant that Kroger does not claim to have insufficient insurance coverage to satisfy the damages award in full. Second, no authority is cited to support Kroger's assertion that present coverages are predicated on general damage awards. This Court in *Hanson v. St. Luke's United Methodist Church*, 704 N.E.2d 1020 (Ind. 1998), did not express concern regarding the level of insurance coverage available to satisfy a damage award.

Because the award is within the scope of the evidence, there is no merit to Kroger's constitutional claims. Kroger's complaint that the Court did not address longstanding rules giving courts authority to remit excessive damages is likewise without merit. Although a jury's discretion in determining damages "is not limitless," *Dollar Inn, Inc. v. Slone*, 695 N.E.2d 185, 190 (Ind.Ct.App. 1998), *trans. denied*, the authority to reduce excessive verdicts is not implicated when the reviewing court finds, as the Court did herein, that the verdict is not excessive. *See, e.g., Kavanagh*, 221 N.E.2d at 829. There is no basis for remitting the award or granting a new trial.

III. THE COURT OF APPEALS CORRECTLY APPLIED RULING PRECEDENT TO DECIDE THAT THE STANTONS' CLAIMS ARE NOT BARRED BY THE EXCLUSIVITY PROVISION OF THE WORKER'S COMPENSATION ACT.

The burden of proving that the Stantons' claims fall within the scope of the Worker's Compensation Act ("the Act") is borne by Kroger as the party challenging the trial court's jurisdiction. *GKN Co. v. Magness*, 2001 WL 244110 at *4-5 (Ind. 2001). The *de novo* standard of review is applicable because the facts before the trial court were disputed and the court ruled

on a paper record. *Id.* at *3. However, the trial court's ruling on Kroger's motion to dismiss for lack of subject matter jurisdiction is presumed to be correct. *Id.*

A. Kroger And Gateway Did Not Constitute A Single Employer Under The Act.

Attempting to defensively pierce the very corporate veil that it alone erected, Kroger contends that the Stantons' claims are barred by the exclusive remedy provision because Kroger and Gateway constituted a single employer. Perceiving little likelihood that equity will ever require it to pierce the corporate veil to protect the same party that erected it, this Court in *McQuade v. Draw Tite, Inc.*, 659 N.E.2d 1016 (Ind. 1995), rejected a similar attempt by a corporate parent to disregard the corporate form to avoid liability. To evade the "separate corporate entity" rule of *McQuade*, Kroger asserts that footnote 4 creates an exception that is applicable when the parent corporation trying to pierce the corporate veil relies on both its interconnectedness with the subsidiary and an express or implied employment contract with the plaintiff. According to Kroger, this case falls within the "exception" to *McQuade* due to the "substantial interconnectedness" with Gateway[7] and a contract of employment with Stanton[8] in the form of a collective bargaining agreement.

Kroger is mistaken in its assertion that "[t]he Opinion concluded that a collective bargaining agreement is not always an express or 'direct' employment contract, because such contracts are often at-will." (Pet., pp. 11-12) The Court stated that *Bentz Metal Prod. Co. v. Stephans*, 657 N.E.2d 1245 (Ind.Ct.App. 1995), "holds that the existence of a collective bargaining agreement does not preclude the existence of an employment at-will relationship

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[7] See Appellees' Brief at pp. 1-2 for facts demonstrating separateness between Kroger and Gateway.

[8] Specifically characterizing it as an *express* contract of employment no less than five times (Appellants' Reply Br., pp. 7-8, 12, and 18), Kroger did not raise the question of an implied employment contract in the Court of Appeals.

between the employer and the employee." (Opinion, p. 18) The Court concluded that *Bentz* "does not stand for the definitive proposition that a collective bargaining agreement *creates* an employment *contract*." (*Id.*)

Kroger contends, based on provisions of the Master Agreement, that "Stanton was not employed at will, but rather could only be discharged for cause." (Pet., p. 12) This contention ignores the statement of the *Bentz* Court that "[e]mployment security provisions in collective bargaining agreements under which the 'employee can no longer be terminated at the whim of the employer,' . . . do not necessarily conflict with the employment at-will doctrine." *Bentz*, 657 N.E.2d at 1249-50.

Kroger cites no authority that supports its contention that the collective bargaining agreement was an employment contract with Stanton. Although a collective bargaining agreement can be considered a contract relating to employment, it is generally not considered to be a contract of employment. *See, e.g., J.I. Case Co. v. Nat'l Labor Rel. Bd.*, 321 U.S. 332, 334-35, 64 S.Ct. 576, 579 (1944)("The negotiations between union and management result in what often has been called a trade agreement, rather than a contract of employment."); *Young v. North Drury Lane Prod., Inc.*, 80 F.3d 203, 206 (7th Cir. 1996)("[A] labor agreement is not a contract of employment."); *In re Continental Airlines Corp.*, 901 F.2d 1259, 1264 (5th Cir. 1990, *cert. denied*, 506 U.S. 828 (1992)("Unlike a contract of employment, ordinarily a collective bargaining agreement does not create an employer-employee relationship . . . . It neither obligates any employee to perform work nor requires the employer to provide work.")

The Court concluded that if any exception is suggested by the "express or implied employment contract" language of the *McQuade* footnote, it would be limited to cases where there is a direct employment contract with the parent corporation, not a collective bargaining

agreement that includes the parent corporation along with other employers. (Opinion, p. 21) Even indulging Kroger's claim that the footnote creates an exception, the Court correctly applied ruling precedent and properly found that there was not a sufficient contractual relationship between Kroger and Stanton to fall within the exception and take this case outside the scope of the *McQuade* holding. (Opinion, pp. 16-23) The Court's decision neither erroneously decides a new question of law nor contravenes ruling precedent.

B. The Opinion Does Not Contravene This Court's Decision In *Degussa*.

Kroger's argument on the borrowed servant issue is merely a re-packaged reiteration of the argument that Kroger and Gateway were so highly integrated that they constituted a single employer. Indeed, Kroger stated, "Much of the evidence which supports the conclusion that Kroger and Gateway are essentially a single entity also supports the conclusion that if Gateway and Kroger are considered separate, Stanton was Kroger's borrowed servant at the time of the accident." (Appellants' Br., pp. 19-20) Although Kroger improperly focuses on its relationship with Gateway, the Court considered the facts that Kroger identifies in the Petition as supporting its assertion that application of the *Hale*[9] factors in this case compels a finding of dual employment.

Kroger claims a right to indirectly discipline Gateway employees. (See Opinion, pp. 11-12) The first *Hale* factor is right to discharge, not right to discipline. *Hale*, 579 N.E.2d at 67. Kroger presented no evidence that it had the power to indirectly discharge Stanton by instructing Gateway that it no longer wanted him to deliver Kroger loads. *See GKN Co.*, 2001 WL 244110 at *5. Gateway alone controlled the hiring, discipline, and discharge of its drivers. (R. 834, 1321-22, 1500-01, 1510)

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[9] *Hale v. Kemp*, 579 N.E.2d 63, 67 (Ind. 1991).

Kroger's provision of the working capital to fund Gateway's operating budget is an aspect of their interconnectedness, not a factor weighing in favor of a conclusion that Stanton was an employee of Kroger. (See Opinion, p. 12) Stanton was paid by Gateway with a Gateway check. (R. 1313-14) Operated under a zero-based budget, on a daily basis all cash *in excess* of Gateway's operating needs is wire transferred for deposit into Kroger's operating account for investment. (R. 770; 1317) Kroger does not claim that Gateway operated at a loss and, therefore, it is reasonable to conclude that at least a portion of Gateway's gross receipts were returned to Gateway to meet its payroll.

The tractors and trailers Kroger supplies to Gateway bear Gateway's logo, are titled in the State of Illinois in the name of Gateway, and carry an Illinois license plate obtained in Gateway's name. (R. 1374; 1378-80) If Kroger employees worked on a Gateway truck, Kroger billed Gateway for the labor time of the Kroger employees and for any parts used. (R. 1318-19; 1354)(See Opinion, pp. 12-13)

Although Kroger claims it prepared the delivery schedule for Gateway drivers, Stanton bid the runs he was to make; he was not assigned by Kroger to make specific deliveries. (R. 834; see Opinion p. 13) Stanton was solely and exclusively under the control of Gateway and received all daily supervision and instructions from Gateway supervisory personnel. (*Id.*) A Gateway dispatcher at Gateway's East Peoria facility gave Stanton written instructions as to which Gateway tractor and Gateway trailer he was to use. (R. 835) Although generally the route a Gateway driver was to follow was determined by Gateway, no route was specified for Stanton the day of the accident. (R. 835; 1328) Nor was Stanton given a time schedule. (R. 835)

Kroger's contention that Stanton was its employee because he received Kroger benefits is covered by the Court's consideration of Stanton's participation in the Kroger 401k plan ("K-

Plan"). (Opinion, pp. 21-22) Additionally, Kroger's collective bargaining agreement with the Teamsters was thoroughly discussed by the Court. (Opinion, pp. 16-21)

The Court also discussed the contract between Kroger and Gateway, identifying several clauses contradicting Kroger's assertion that it perceived Gateway drivers to be Kroger employees. (Opinion, pp. 9-10) Under the contract, Gateway was a "bailee only" and title to all product delivered for Kroger remained in Kroger. (R. 932) Each company agreed to hold the other harmless and indemnify the other from all claims, suits, and judgments for damages caused by the act or omission of its agent or employee. (*Id.*) Gateway had to furnish evidence of coverage under Illinois' worker's compensation laws. Kroger was required to pay Gateway for each case of product it delivered and for transportation charges according to the published tariff. Gateway would deliver store mail to Kroger stores for a per-delivery fee. The Court correctly noted, "These contract provisions are not the type one would typically expect Kroger to have in an agreement with its own employees." (Opinion, p. 10)

Under the *GKN* test, there was no dual employment. Additionally, the Opinion does not contravene this Court's decision in *Degussa Corp. v. Mullens*, 2001 WL 267766 (Ind. 2001). There is no indication on the face of the *Degussa* opinion that a parent-subsidiary relationship was involved in that case as Kroger claims.[10] Nevertheless, the Court considered Kroger's borrowed servant argument, albeit not in a direct analysis of the *Hale* factors. Kroger simply failed to persuade the Court that the balance of evidence is tipped against the trial court's findings[11] relating to Kroger's relationship with Stanton.

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[10] There appears to be no parent-subsidiary relationship between Agritek, the corporation claiming to be the plaintiff's employer, and Grow Mix, the plaintiff's employer. Under the contract between them, Grow Mix was a subcontractor of Agritek. *Id.* at *5-6.

[11] The Court noted that "[t]he trial court necessarily made factual determinations in reaching its conclusion that Stanton's claim was not barred by the Act, even though it did not issue written findings detailing those specific determinations." (Opinion, p. 6)

CONCLUSION

For the foregoing reasons, the Stantons request that this Court deny Defendants' Petition to Transfer.

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IN THE
INDIANA SUPREME COURT

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NO. _____

IRA C. RITTER and THE KROGER CO.,	)	Indiana Court of Appeals No. 49A02-9912-CV-00883
Appellants (Defendants below),	)	
v.	)	Appeal from the Marion Superior Court, No. 10
JERRY STANTON and RUTH A. STANTON,	)	Cause No. 49D10-9506-CT-0959
Appellees (Plaintiffs below).	)	The Honorable Richard H. Huston, Judge

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I. ARGUMENT

A. $67 MILLION FOR GENERAL DAMAGES IS EXCESSIVE

$67 million for general damages. Plaintiffs never mention this amount in their Brief in Opposition to Transfer, perhaps fearful this Court would indeed blush at its enormity. By any measure, this award is excessive and must be reduced.

1. This Award Fails The "First Blush" Test

Kroger does not seek to overturn the "first blush" test; it simply asks that the test be applied. An award is excessive under this test if it "appear[s] to be so outrageous as to impress the Court at 'first blush' with its enormity." *Kimberlin v. DeLong*, 637 N.E.2d 121, 129 (Ind. 1994), *cert. denied*, 516 U.S. 829 (1995).

Review of a **non-pecuniary** award, such as this one, is a two-step process: First, whether any award at all is justified, and second, by applying the "first blush" test, whether the amount awarded is within the bounds of reason. *See Hibschman Pontiac, Inc. v. Batchelor*, 266 Ind. 310, 362 N.E.2d 845 (1977) (evidence supported award of punitive damages, but amount awarded violated "first blush" rule). Limiting the inquiry to the first step, as Plaintiffs urge, is only appropriate when reviewing a **pecuniary** damage award[1] and where there are objective criteria to evaluate (the "within the scope of the evidence" test). However, when reviewing a **non-pecuniary** loss, the "first blush" test is used because the amount of non-pecuniary loss is not capable of objective ascertainment. Otherwise, there would be no need for the "first blush" test.

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[1] *Sears Roebuck & Co. v. Manuilov*, 742 N.E.2d 453 (Ind. 2001), and *State v. Daley*, 153 Ind.App. 330, 287 N.E.2d 552 (1972), cited by Plaintiffs, both involved pecuniary damage awards and are thus inapposite. The issue of excessive non-pecuniary damages was not presented.

Kroger agrees that the Stantons' injuries justify a substantial award of general damages. However, this award, on "first blush", exceeds the bounds of reason. Pursuant to its authority under IND. APPELLATE RULE 15(N),[2] this Court should order a new trial or a new trial subject to remittitur.[3]

2. The Court Of Appeals Was Obligated To Engage In A Meaningful Review

Plaintiffs argue that Indiana appellate courts have no authority to disturb a jury award of damages, and that a jury's discretion in assessing damages is limitless. The Court of Appeals agreed. This is **not** Indiana law.

First, APP.R. 15(N) provides the authority to reduce excessive verdicts, and has the full force of law. *See* IND. CODE § 34-8-2-2 (general assembly incorporates into the Indiana Code Supreme Court rules). No case has held this Rule unconstitutional.[4]

Second, as Plaintiffs recognize, appellate review of excessive verdicts has been a longstanding part of Indiana jurisprudence. *See*, e.g., *Louisville & N. R. Co. v. Kemper*, 153 Ind. 618, 53 N.E. 931 (1899) (common law "first blush" test); *State v. Church of Nazarene of Logansport*, 268 Ind. 523, 377 N.E.2d 607, 610 (1978) (authority under the appellate rules).

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[2] Now RULE 66.

[3] The use of remittitur to set aside verdicts that are "clearly disproportionate to community expectations" is a recommended method of controlling unrealistic awards. American Bar Assoc., *Report of the Action Commission to Improve the Tort Liability System*, 13 (1987). Using remittitur to control "runaway" jury awards is not the same as imposing a cap on pain and suffering damages, as Plaintiffs imply, and Kroger does not request such a cap. Kroger simply asks that the process provided by Indiana law to review excessive verdicts be applied to this case.

[4] Contrary to Plaintiffs' assertion, *Carbone v. Schwarte*, 629 N.E.2d 1259 (Ind.Ct.App. 1994), does **not** hold that IND. CONST. art 1 § 20 constrains appellate review of a verdict challenged as excessive. *Carbone* merely restates settled law that an appellate court does not reweigh evidence. *Id.* at 1261.

Third, the right to a civil jury trial does not equate to a jury's right to award any amount of damages. Although the jury's discretion in determining damages is broad, it "is not limitless." *Dollar Inn, Inc. v. Slone*, 695 N.E.2d 185, 190 (Ind.Ct.App. 1998), *transfer denied*; *see also Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S.Ct. 2211, 2222 (1996) (the "fair administration of justice" must be balanced against the right to jury trial; jury discretion must have an "upper limit").

The Court of Appeals had the "duty to insure that the jury acted properly in assessing damages." *Groves v. First Nat'l Bank of Valparaiso*, 518 N.E.2d 819, 831 (Ind.Ct.App. 1988), *transfer denied*. Kroger was entitled to meaningful review of the award, and the Court's conclusion that it could not do so was erroneous.

3. Considering Verdicts In Comparable Cases Is An Accepted Tool Of Judicial Review

Kroger is not espousing a radical departure from accepted jurisprudence. In evaluating an award for excessiveness, particularly where, as here, the vast majority is for non-pecuniary damages, many jurisdictions, including Indiana, have compared the award in question to awards in factually similar cases. *See*, e.g., *Groves*, 518 N.E.2d 819; *Miksis v. Howard*, 106 F.3d 754 (7th Cir. 1997); *Sanders v. City of Indianapolis*, 837 F.Supp. 959, 966 (S.D.Ind. 1992). A "comparability analysis" can provide an objective frame of reference. *Wheat v. United States*, 860 F.2d 1256, 1259 (5th Cir. 1988). Indiana's "first blush" test, by its very nature, invites a comparison to other verdicts.

The general damages awarded the Stantons are nearly nine (9) times the highest amount awarded during the last five years **nationwide** to a husband and wife for injuries received in a vehicular accident. Moreover, the award is more than nine (9) times the highest Indiana verdict. Although the nature of the injuries justifies a large damage award, any award of compensatory

damages must be reasonable. An award of $67 million in general damages is simply not reasonable. The general damage award is excessive and must be remitted or a new trial granted.

B. CONSTITUTIONAL AND WORKER'S COMPENSATION ISSUES

Kroger stands on all other arguments raised in its Transfer Petition.

II. CONCLUSION

Kroger requests that this Court grant transfer.

Respectfully submitted,

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Clerk

Cause Number
49A02-9912-CV-00883
Lower Court Number:
49D109506CT959

RITTER, IRA, ET.AL. -V- STANTON, JERRY & RUTH

You are hereby notified that the SUPREME COURT has on this day 1/31/02

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL T. SHEPARD, CHIEF JUSTICE ON BEHALF OF THE COURT ALL JUSTICES CONCUR, EXCEPT SHEPARD, C.J. AND SULLIVAN, J., WHO VOTE TO GRANT TRANSFER. MS

WITNESS my name and the seal of said Court.
this 31ST day of JANUARY, 2002

Brian Bishop
Clerk Supreme Court, Court of Appeals and Tax Court

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